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No. A-682

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WAYNE ROBERT FELDE,

PETITIONER,

V.

LOUISIANA,

RESPONDENT.

ON WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

NATHANIEL GRAVES THOMAS
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318-221-2241
[MARCH 17, 1983]

QUESTION PRESENTED FOR REVIEW

Did the Louisiana Supreme Court err in upholding the conviction and death sentence of Petitioner despite the extremely prejudicial and unconstitutional trial utilization, over defense objections, by the State Prosecutor of a non-verbatim summarization of post-indictment inculpatory statements purportedly obtained from Petitioner during a custodial pretrial psychiatric examination (interrogation) by a member of the State Sanity Commission appointed by the State Judge on motion of the State Prosecutor, where the non-verbatim summarization of the purported statements utilized at trial by the State Prosecutor: 1.) Was neither offered nor admitted into evidence thereby effectively depriving Petitioner of his Sixth Amendment right to confrontation and his Fourteenth Amendment right to due process of law; 2.) Was obtained from Petitioner in violation of the procedural Miranda advice of rights requirements; 3.) Was not shown to be reliable and trustworthy for Fifth and Fourteenth Amendment purposes; 4.) Was obtained from Petitioner in violation of his Fifth and Fourteenth Amendment rights to freedom against self-incrimination and to due process of law in light of Petitioner's deteriorated physical and medical condition and mental and emotional state, and the barbaric conditions and coercive atmosphere of his confinement, at the time the statements were purported to have been obtained, all of which factors necessarily preclude Petitioner from having the mental competence and ability necessary to freely and voluntarily furnish such statements, the free and voluntary character of which was never shown; 5.) Was obtained from Petitioner in violation of his Sixth Amendment right to counsel; and, 6.) Was not harmless, and was not declared by the Louisiana Supreme Court to be harmless, beyond a reasonable doubt?

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No. A-682

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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V.

LOUISIANA,

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REPORT OF THE OPINION BELOW

The opinion below is reported as State of Louisiana v. Wayne Robert Felde, 422 So.2d 370 (La. 1982).

JURISDICTIONAL STATEMENT

The judgment of the Louisiana Supreme Court affirming the conviction and death sentence of petitioner, from which judgment review is sought, is dated October 18, 1982.

The order of the Louisiana Supreme Court denying the rehearing application of petitioner is dated December 17, 1982.

On February 7, 1983, Honorable Byron R. White, Justice, issued an Order granting petitioner an extension of time within which to petition for certiorari to and including March 17, 1983.

28 U.S.C. §1257(3) is the statutory provision believed by petitioner to confer this Honorable Court with jurisdiction to review the judgment in question by writ of certiorari, to wit:

> §1257. State courts; appeal; certiorari
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (3) By writ of certiorari, ...where any ... right, privilege or immunity is specially set up or claimed under the Cosntitution, treaties or stautes of, ...the United States.

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CONSTITUTIONAL PROVISIONS RELIED UPON

Fifth Amendment, United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment, United States Constitution:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

* * * * *

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STATEMENT OF THE CASE

Court History

November 15, 1978: The Caddo Parish District Attorney in Shreveport, Louisiana, personally obtained a Grand Jury Indictment charging petitioner Wayne Robert Felde with the capital offense of "First Degree Murder" of Shreveport police officer Thomas Glenn Tompkins on October 20, 1978. Immediately following the return of the Bill of Indictment in Open Court, the Judge presiding, on motion of the prosecution, appointed inexperienced criminal counsel [other than present undersigned counsel who did not enroll in the case until July 13, 1979], whose law practice was almost exclusively civil in nature, to defend petitioner, who was not present in the courtroom but was still hospitalized in critical condition as the result of numerous .00 buckshot wounds inflicted when petitioner was shotgunned by Shreveport police while still handcuffed at the time of his apprehension shortly following the Tompkins shooting.

January 19, 1979: Immediately following his transfer from the hospital to the Caddo Parish Jail, petitioner, still incapacitated and unable to walk from the ensuing operations and injuries suffered from the buckshots, was literally hand-carried by two jail trustees from the seventh floor jail down to the second floor courtroom in the Caddo Parish Courthouse for arraignment. Without prior consultation with, but upon the instructions of his civil court-appointed defense counsel, petitioner entered a dual plea of "Not Guilty and Not Guilty by Reason of Insanity" and, on motion of the State prosecutor, and without objection from court-appointed defense counsel, a State Sanity Commission was appointed by the presiding State Judge to conduct psychiatric examinations of the emaciated and pain-wrecked petitioner. Appointed to the State Sanity Commission by the State Judge were: 1.) The head of the State mental health center located in Shreveport who had recently been a Deputy Caddo Parish Coronor and who currently was paid by the Caddo Parish Coronor for performing autopsies; and, 2.) The elderly head of the State mental health center in Lafayette who had formerly headed the State mental health center in Shreveport who was also an ex-Deputy Caddo Parish Coronor; and, 3.) The Caddo Parish Coronor, a general practitioner, who had personally performed the autopsy on the dead police officer in the case on the night he died.

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March 12, 1979: Petitoiner appeared in Open Court at which time the State Judge summarily overruled pro forma defense motions filed by court-appointed counsel for a change of venue and to quash the indictment, and the "form" defense bill of particulars motion was deemed by the State Judge to have been satisfied by the response of the State prosecutor thereto.

April 20, 1979: A letter written by petitioner to the State Judge expressing strong reservations about the civil counsel appointed to represent petitioner and requesting appointment of different defense counsel to replace him, was filed in the Record.

May 23, 1979: The State Judge in Open Court ruled that the State prosecution discovery motion had been satisfied by the defense.

May 25, 1979: Petitioner appeared in Open Court with his court-appointed defense counsel at which time the State Judge summarily denied the written request by petitioner that different counsel be appointed to replace his court-appointed defense counsel.

June 13, 1979: Petitioner and court-appointed defense counsel appeared in Open Court at which time the State Judge again summarily denied a second written request by petitioner which expressed strong reservations and misgivings about the civil counsel who had been appointed by the Court to represent petitioner and which had again requested that an experienced criminal practitioner be appointed as a replacement.

July 13, 1979: Current undersigned counsel, a criminal practitioner and former state and federal prosecutor, retained by petitioner's sisters and brothers-in-law, enrolled as defense counsel for petitioner in place of court-appointed defense counsel.

September 5, 1979: Petitioner and defense counsel appeared in Open Court and, following the disposition of numerous preliminary matters, an evidentiary hearing commenced on a defense motion to recuse the local State judiciary for prejudice.

September 6, 1979: Following the presentation of additional evidence and the argument of counsel, the defense motion to recuse the local judiciary was denied and a defense application to the Louisiana Supreme Court for remedial writs on the motion was denied on September 17, 1979. State v. Felde, 375 So.2d 112 (La. 1979).

September 7, 1979: An evidentiary hearing commenced on a second defense motion for change of venue filed on August 31, 1979.

September 8, 1979: A conflict of interest motion filed against defense counsel by the State prosecutor was unsuccessful.

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September 10, 1979: Additional evidence was presented by the defense as the evidentiary hearing on the second defense change of venue motion continued.

September 17, 1979: The second defense change of venue motion was denied by the presiding State Judge.

December 12, 1979: An evidentiary hearing commenced on a third defense motion for change of venue filed on December 3, 1979, and continued to be heard on December 14 and 19, 1979.

December 24, 1979: The third defense motion for change of venue was denied by the presiding State Judge, pursuant to which the defense furnished notice of its intent to apply to the Louisiana Supreme Court for remedial writs on the motion.

January 3, 1980: The Louisiana Supreme Court granted the defense application for remedial writs and stayed the State District Court proceedings in the case until further notice. State v. Felde, 378 S.2d 1375 (La. 1980).

April 7, 1980: The Louisiana Supreme Court vacated the Judgment of the State District Court denying the third defense motion for a change of venue, and directed the State District Court to order a change of venue for petitioner's trial. State v. Felde, 382 So.2d 1384 (La. 1980).

April 16, 1980: The presiding State Judge ordered venue for petitioner's trial changed from Caddo Parish (Shreveport) to Rapides Parish (Alexandria), a location 128 miles to the south.

August 11, 1980: Trial commenced in State Court in Rapides Parish and, over the protests of both the State prosecutor and defense counsel, the presiding State Trial Judge announced his intention to conduct the trial on a seven-day-a-week basis from 9 o'clock a.m. until 10 o'clock p.m. -- thirteen Courthouse hour days -- until the trial was over. The presiding State Trial Judge desired to have the trial concluded before the August 23-24, 1980, Labor Day weekend when the State Trial Judge and his son, who was also his law clerk, were scheduled to participate in the annual Deep South Four-Ball Tournament at the Alexandria Country club. [Note: The State Trial Judge did play in the tournament and finished in Thrid Place.]

August 12, 1980: The trial continued as defense motions for production by the State prosecutor of favorable witness information and exculpatory police photographs which had been withheld, were denied by the State Trial Judge.

August 13, 1980: The State Trial Judge, over strenuous defense objection, summarily granted a motion by the State prosecutor to have petitioner, a U.S. Army

veteran of heavy combat in the South Vietnam Central Highlands during the Vietnam War, undergo an additional psychiatric examination by more State prosecution experts in the middle of the trial relative to the mental state of the petitioner at the time of the October 20, 1978, shooting, as it related to mental disorders which developed in petitioner as the result of his Vietnam combat experience (Post-Traumatic Stress Disorder) and his exposure as a "tunnel rat" in Vietnam to the contaminant Dioxin contained in the defoliant Agent Orange. The defense then furnished notice of its intent to apply to the Louisiana Supreme Court for remedial writs on the motion.

August 14, 1980: The trial continued.

August 15, 1980: The Louisiana Supreme Court granted the defense remedial writ application and vacated the order of the State Trial Judge for a mid-trial examination of petitioner by prosecution experts. State v. Felde, 386 So.2d 919 (La. 1980).

August 16-19, 1980: The trial continued.

August 20, 1980: The tenth consecutive day of trial. At 11:08 p.m., petitioner was convicted of First Degree Murder and at 1:01 a.m., the next morning, August 21, 1980, the death penalty was returned as the petitioner had requested following the erroneous rejection by the trial jurors of the Post-Traumatic Stress Disorder (PTSD) -- Agent Orange (Dioxin) exposure based defense of insanity. The complete trial schedule of Courthouse days and hours rigidly adhered to by the State Trial Judge is as follows:

August 11 (Monday)	---	9 a.m. to 10:15 p.m.
August 12 (Tuesday)	---	9 a.m. to 9:30 p.m.
August 13 (Wednesday)	---	9 a.m. to 9 p.m.
August 14 (Thursday)	---	9 a.m. to 8:30 p.m.
August 15 (Friday)	---	9 a.m. to 3:15 p.m.
August 16 (Saturday)	---	9 a.m. to 3 p.m.
August 17 (Sunday)	---	10 a.m. to 7 p.m.
August 18 (Monday)	---	9 a.m. to 7:30 p.m.
August 19 (Tuesday)	---	9:30 a.m. to 6 p.m.
August 20 (Wednesday)	---	9 a.m. to midnight
August 21 (Thursday)	---	12:01 a.m. to 1:15 a.m.

January 20, 1981: Following an evidentiary hearing on a defense motion for new trial, the motion was denied by the State Trial Judge.

February 13, 1981, A Friday. Petitioner was sentenced to death by the now-retired State Judge who presided over the trial.

October 18, 1982: The Louisiana Supreme Court rejected the 50 Assignments of Error cited by petitioner and affirmed the conviction and the sentence. State v. Felde, 422 So.2d 370 (La. 1982).

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December 17, 1982: The Louisiana Supreme Court denied the rehearing application of Petitioner.

Facts

PERSONAL BACKGROUND: Petitioner is a thirty-three (33) year old honorably discharged United States Army combat veteran of the Vietnam War. Petitioner was born in Sheboygan, Wisconsin, March 25, 1949, to white, lower-middle class parents, Christ and Ruby Felde, and was the youngest of three children, having two older sisters, Marie Christine and Florence Yvonne. Petitioner's father, a postman, had served as a medic in World War II and suffered from recurrent combat nightmares and resultant excessive drinking. When petitioner was thirteen (13) years old, his parents separated and, six months later, his father, at the age of forty-three (43), died from an overdose of sleeping pills taken in a "suicide pact" with a twenty-seven (27) year-old married woman. Badly shaken by his father's suicide, petitioner was sent to a psychiatrist for counseling by his mother, who was a registered nurse. Petitioner's mother raised all three children alone and never remarried.

On June 15, 1967, petitioner graduated from DuVal High School in Glendale, Prince George's County, Maryland. Although wanting to go to college to be a veterinarian, petitioner and his family could not afford for him to do so. The Vietnam War was in full force at the time and, instead of waiting to get drafted, petitioner decided to join the Army, planning to get his service obligation behind him and use the GI Bill to go to college.

MILITARY BACKGROUND: On August 14, 1967, at the age of eighteen (18) and three (3) months following his highschool graduation, petitioner volunteered for the United States Army upon receiving a commitment from the recruiter at Fort Holabird, Baltimore, Maryland, that he would receive training as a "bridge builder".

Petitioner underwent Basic Combat Training at Fort Bragg, North Carolina. From there he was sent to Fort Gordon, Georgia, for Advanced Individual Training as an infantryman instead of receiving his promised "bridge-builder" training. On February 12, 1968, petitioner waived a commitment which he had received from the Army for training as an Airborne Ranger in order that he could be immediately assigned to a combat unit in Vietnam, which would enable him to complete his military obligation sooner and get back to civilian life.

VIETNAM: Following a thirty (30) day leave which he spent at home with his mother and sisters, petitioner left for Vietnam, arriving on March 25, 1968 -- his nineteenth birthday.

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After completing a week of in-country jungle combat training, petitioner was assigned to the 4th Infantry Division which was stationed in the Central Highlands of South Vietnam, near the intersection of the borders of Cambodia, Laos and Vietnam -- an area which was situated directly in the path of the Ho Chi Minh Trail, the principle enemy infiltration route into South Vietnam.

The type of role mission and experience to which petitioner and other members of the 4th Infantry Division were exposed in the Central Highlands was addressed in State Trial Defense Exhibit #213, a narrative U.S. Army film containing film clips of the 4th Infantry Division in action in the Central Highlands of South Vietnam, which stated in pertinent part:

BY THE NARRATOR:

> . . . 'in Viet Nam, a varied and changing fatal land. Viet Nam is different. Although, we do engage in conventional combat with well-organized North Vietnamese Military Units who support the Viet Cong guerrillas, our enemy here is active over most of the countryside and rarely is there a conventional battle line.
>
> Our job here is to find them and then destroy them, but because the enemy over here is fighting basically an unconventional war, he does not rely on holding terrain.
>
> These gallant American soldiers, these fighting men of the 4th Infantry Division were dealt a tough hand in the Viet Nam War.
>
> It was their lot to draw the almost impenetrable jungle of the II Corps area near the Cambodian Border to face the elite Regular North Vietnamese Army.
>
> Assigned to a narrow corridor honeycombed with North Vietnamese Units, operating all the way from the Cambodian Border to the costal plains of South Viet Nam, the courageous fighting men carried the war to the enemy and faced him toe to toe for a slug out that ended in triumph for the 4th Infantry Division and a greatly expanded area of influence for the II Corps.
>
> This is the heroic story of the 4th Infantry Division in Viet Nam.
>
> * * * * *
>
> The Central Highlands. Difficult terrain made up of jungle, mountains and waterways with the highest incidence of Malaria in Viet Nam. This was the lot of the 4th Division.
>
> The harsh countryside was peopled mostly by Montagnards, a nomadic people, who slash and burn clearings in the forest, farm it for a time and then move on.
>
> Harrassed and terrorized by the Viet Cong, these gentle folk fell victims of a time and circumstance they could not battle.
>
> Unique fighting men swept through the steaming jungle near the Cambodian Border seeking to block North Vietnamese regiments

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who periodically dashed across the border in hopes of a quick victory.

Often, small units of fighting men would suddenly clash with overwhelming numbers of the enemy who pounced with swift veracity.

When the big guns of the force were called into the bush and the heavy lead began to fly, the North Vietnamese Army, NVA, disengaged as quickly as they had appeared.

• • • • •

Choppers were called in for all types of assignments. Top priority went to combat assault missions.

To spot enemy concentrations under the umbrella of dense jungle foliage, light observation helicopters were used. Once they located the enemy, the light spotters called for their big brothers, the heavily armed Huey gunships.

These choppers pack an impressive resource of firepower. The gunships strike quickly with uncanny accuracy and formidable power.

Their presence on the scene was welcomed by the ground troops below who moved in quickly to exploit the gunship attack; for the NVA, this technique was a costly experience which resulted in a great loss of men, installations and equipment.

• • • • •

Between contacts with the enemy, the existence of the 4th Division was characterized by long periods of watchful waiting, with time to relax, for short but brutal pitched battles.

To careen and guard the strategic border west of Pleiku.

Throughout the extensive operation, the units of the fighting 4th had clashed with the well-equipped North Vietnamese troops infiltrating into South Viet Nam. Moving men and equipment quickly into place to block enemy forces wherever they chose to cross the border.

During the operation, massive artillery was imploded. More than four hundred thousand rounds hit the enemy where it hurts.

This devastating firepower was a major factor in quelling the enemy offensives and in demoralizing the NVA forces.

Countless tunnels and holes in the area turned up Viet Cong supplies and prisoners, but along with the spoils, the IV men had to pay a price for victory.

In Central Highlands, the most significant battles were on the hilltops since the force that could control the hilltops, controlled the valleys below.

The 4th Division fought to seize the most strategic hilltops for firebases, this meant several days of saturation air strikes and artillery fire.

After the infantry had forged its way to the top, a bunker-type perimeter defense was constructed, followed by a land clearing operation. When completed, the hilltop was a barren, dusty

knob protruding from the valley floor, but even then the area was by no means secure and had to be defended against enemy assaults.

Combat patrols were sent to seek out and ambush the enemy positions for IV artillery.

While in the valley, pursuit of the NVA continued.

As the struggle went on, a new enemy build up in the Duc Toe area was reported in the winter of '68.

Troops of IV men were airlifted for an assault on strategic Hill 1049.

Wave after wave of helicopters lifted the fighting men into the assault.

Moving with the precision of a well integrated combat force, the seasoned IV men fought their way through enemy held positions and took the hill in five sorties.

From their newly won hilltop advantage, the men of the 4th were then able to send out numerous short range reconnaissance patrols to locate the enemy and report their position. Mortar fire was then poured into the positions to pin the enemy down.

A. H. 1-G Huey Cobras swept in with rockets and raking machine gun fire.

The 4th Division has been eminently successful in the Central Highlands. Within two years, their zone of influence increased ten-fold, covering some ten thousand square miles of rugged terrain.

That's the story.

The success of the 4th Division's mission was due to the dedication of young men working as a team. Each man was totally devoted to the job at hand and to his fellow soldier; dedicated to give the best that was in him because that was the best way out for himself, too.

The 4th Division answering its third call to arms, saw its duty in Viet Nam Central Highlands and did it with dignity and distinction.

The officers and the men of the seasoned 4th Infantry Division stand fully prepared to defeat Communist aggression and give the people of South Viet Nam the opportunity to live in peace and in freedom.

Throughout Viet Nam, the IV patch is worn proudly by IV men and feared by the enemy.

Film Concluded

State Appellate Record, pp. 2039-2048;
State Trial Transcript, pp. 1591-1600.

On April 6, 1968, petitioner was flown by helicopter to join his new unit, Company D, 2nd Batallion, 35th Infantry, 4th Infantry Division. When he arrived at the firebase, it was in the middle of a vicious firefight.

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[Excerpt of State Trial testimony of petitioner of direct examination.]

Q. And it was about a week and then you were taken to LZ [Landing Zone] Pollyann (sic)?

A. Yes, sir.

Q. And that was your first firebase. Is that right?

A. Yes, sir.

Q. Would you describe what the scene was like when you arrived at LZ-Pollyann (sic)?

A. When we arrived there . . . six-inch guns were going off . . .

Q. What time of day was it?

A. It was about five or six o'clock in the evening. The guns were going off. The company that I was to join was up on a ridge in a firefight. And the helicopters there were to bring us out to join our company, were bringing in the bodies from people up there.

Q. All right. Now, would you describe what you did then, when the helicopters came in?

A. When they came in, the one that we were to get on, there was me and about four or five other fellows, we had to pull four bodies off wrapped up in poncho liners and, like, an arm fell out, the people were burned . . .

Q. Poncho liners, you mean just the type of liners that people snap into their ponchos?

A. That you throw the bodies into; right, because they'll be in pieces . . .

Q. . . . all right . . .

A. . . . they're burned up, scarred up.

Q. Did you later learn what caused . . . had you ever seen a body like that before?

A. No, sir.

Q. Did you later learn what caused them to be like that?

A. Napalm.

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Q. And after the bodies were off the helicopter, off the chopper, what did you all do?

A. Well, we got on the helicopter and they flew us out to where our company was on the ridge.

Q. What was your company doing?

A. They were engaged in battle.

Q. All right. What happened when you joined the company?

A. Okay. By the time we joined the company, it was dark, they was momentarily firing, they'd fired all through the night but it wasn't no constant battle. And the artillery was coming in all night and there was a man screaming and I learned he was the point man.

Q. Did you know who he was?

A. No, sir.

Q. Would you explain to the Jury what a 'point man' is?

A. A point man, which I found out later, is every time you go on patrol, they have one man walk approximately fifty to seventy-five meters ahead of the company. He's kind of like a sacrifice. He's to draw fire to save the rest of the company and a lot of times it will work with the Viet Cong when there's only a few in the area. However, if you walk into a regiment troop, they'll let that point man pass because they're pretty hip to what we do, and then when the company gets on them, they'll open up on the company and the point man is separated from the company.

* * * * *

Q. Now, what was going on when you arrived that night with regard to the point man?

A. He was screaming. They were torturing him and there was nothing we could do, and we heard him scream all night. In the morning, we moved out to recover his body and to run the 'gooks' on out of the area. They, they spread out. The firefighting lasted approximately two hours, gunships were brought in, rockets were

fired and we had to pickup all the bodies to send back to the rear and they were all burned up bad.

State Appellate Record, pp. 2053-2056; State Trial Transcript, pp. 1605-1608.

Petitioner remained with Company D for his entire 1968-69 Vietnam tour of duty at the various firebases situated up and down the Cambodian-South Vietnam border. Frequently embroiled in firefights and combat assaults similar to that which confronted him upon his April 6, 1968, arrival at his unit, petitioner served as an M-60 machinegunner for his first seven (7) months in-country, and an 81 mm. mortarman for the last five (5) months of his tour. LZ (Landing Zone) Mile High and LZ Pollyanne were just two of many firebases from which petitioner and the other members of Company D, 2nd Batallion, 35th Infantry, 4th Infantry Division, worked patrols into the steamy Vietnam jungle of the Central Highlands.

AGENT ORANGE (DIOXIN) EXPOSURE: Cambodia was being utilized as a sanctuary by North Vietnamese Army Regulars and the Ho Chi Minh Trail was heavily utilized by the enemy as an infiltration route into South Vietnam. Due to its proximity to the Cambodian border and to the Ho Chi Minh Trail, the Pleiku-Kontum area of South Vietnam, in addition to the B-52 saturation bombings nearby in Cambodia, was heavily sprayed with the defoliant Agent Orange, which contained dioxin, along its border with Cambodia -- particularly during the 1968-1969 period. This was, of course, the same area in which the firebases to which Company D was assigned were located and throughout which petitioner and the other members of Company D were conducting reconnaissance patrols and search and destroy missions.

Nicknamed "Mouse" by his patrol leader, petitioner was further exposed to Agent Orange through his duties as a "tunnel rat" pursuant to which he would have to crawl into Viet Cong tunnels in search of enemy supplies and personnel.

RETURN FROM VIETNAM: On March 22, 1969, petitioner returned to the United States from Vietnam. At the time of his arrival, the anti-war movement in the United States was at a fever pitch.

POST WAR PS YCHOLOGICAL PROBLEMS: Though not having suffered any serious physical injuries in Vietnam, petitioner was severely wounded mentally by his combat experiences and by his experiences upon returning home. His fun-loving, happy-go-lucky personality was a thing of the past, having been replaced by withdrawal,

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flashbacks, paranoia, nightmares, nervousness, irritability, frequent mood changes, intoxication, arguments, fistfights and self-destructiveness in general. The photographs of petitioner filed as defense exhibits at the State Court Trial show that the baby-faced 18 year old who went to Vietnam returned a year later looking like an old man.

NON-JUDICIAL PUNISHMENT: During the year petitioner remained in the Army following his return from Vietnam, he was disciplined four times pursuant to Article 15. One Article 15 was received at Fort Dix, New Jersey, when, at a time when petitioner was a lifeguard at the N.C.O. Club, he went AWOL and his whereabouts were unknown until his sister Flo located him twelve (12) days later in jail in Daytona Beach, Florida, charged with vagrancy. At Fort Meade, Maryland, petitioner received an Artcile 15 for being drunk while on duty as an MP, and on two other occasions received an Article 15 for again being AWOL -- once for seventeen (17) days and once for four (4) days.

POST-WAR PERSONALITY DISORDERS (Continued): Petitioner's mother was a registered nurse and was painfully aware of petitioner's need for psychiatric treatment following his return from Vietnam. Her repeated contacts with his superiors, and on one occasion the Pentagon, in an attempt to have them require petitioner to undergo psychiatric treatment met without success.

David Krebsbach, a contractor who was and remains married to petitioner's other sister, Maria, was one of the numerous trial witnesses who testified that they recognized the change in petitioner following his return from Vietnam. In a letter dated September 14, 1975, Krebsbach wrote:

> "He served in combat over in Viet Nam. Upon his return from Viet Nam, he was stationed nearby and resided with us. He was a changed person upon returning from Viet Nam. He was very quiet and not as fun-loving, had nightmares talking in his sleep, was nervous and twitchy and started drinking."

HONORABLE DISCHARGE: On September 15, 1970, petitioner received an honorable discharge fromthe United States Army.

POST-WAR PROBLEMS: Petitioner's disturbed post-Vietnam mental state did not dissipate following his discharge from the Army. The abnormal personality traits and behavioral disorders remained. Following his discharge, petitioner first lived in Greenbelt, Maryland. His mother could not persuade him to go to a psychiatrist because petitioner was afraid that if he made anyone aware of the mental experiences he was undergoing regarding Vietnam, they would think he was crazy and have him

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committed to a mental institution. On occasion, petitioner's mother attempted to talk to him about Vietnam herself, but he simply could not bring himself to face up to it and discuss it with her. If anyone other than his mother would attempt to discuss the subject of Vietnam with petitioner, he would become extremely angry.

During the two years following his honorable discharge from the United States Army, petitioner quit numerous jobs, quit technical school several times, quit college, was arrested for DWI several times, married his highschool sweetheart only to have the marriage start to fall apart after several months, drifted to Benson, Louisiana, where his mother had moved to live with her elderly father, left Benson after being unable to hold several jobs there, and began drifting again, and finally returned to Maryland where he got a job as a carpenter and attempted to reconcile with his wife.

1972 MARYLAND HOMICIDE: On November 28, 1972, at the age of twenty-three (23), petitioner was arrested by Prince George's County police in connection with the death of William Tim Balckwell, a twenty-seven (27) year old ex-convict who was out on parole at the time from a ten (10) year prison sentence imposed pursuant to an "assault with intent to maim" offense. Petitioner and Blackwell were carpenters on the same construction project and, having gotten off of work early that day, had gone beer drinking, ending up at the apartment of petitioner and his wife in Greenbelt, Maryland. Petitioner's wife had just gotten home when they arrived.

The two men, both of whom were somewhat intoxicated, began arguing and, after Blackwell struck petitioner on the head, a struggle ensued in which much of the furniture in the apartment was knocked over. Petitioner's wife ran from the apartment when the two men began struggling in the bedroom closet over a M-I carbine loaded with a full clip which petitioner had shown to Blackwell the week before. The weapon discharged repeatedly during the struggle and Blackwell was hit in the eye by a single bullet which killed him instantly.

In the 1972 Maryland incident, as in the 1978 Shreveport incident, petitioner dissociated when the weapon began discharging during the struggle in the small compartment, as confirmed by the 1973 testimony of a Maryland psychiatrist, Dr. Guillermo Olivos, who saw petitioner ten days following the incident:

> "During the interview he (petitioner) had with me he appears to be kind of stunned. He actually was in, sort of like -- his memory was so spotty that he had this ambivalence about 'did I do it or how did I do it; did I do it in self-defense or what?" See, State Trial Defense Exhibit 167.

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"VIETNAM": Police responded to a disturbance call by neighbors who had a bullet come through their wall and when the police arrived at the scene petitioner barracaded himself in the apartment, fired shots through the door, and shouted incoherently about "Vietnam".

Petitioner's mother, who spoke to him over the telephone during the seige, testified at the 1973 Maryland trial that "he sounded more like an animal than man". Defense Exhibit 163.

Petitioner held police officers at bay for more than an hour, until his mother arrived at the scene. She testified as to what occurred upon her arrival:

"Q. Then what happened next?

A. Wayne came out.

Q. What did you do or what did Wayne do when he came out?

A. Wayne came out. He had his hands up on the wall. When he first came out he was staring all around, looking.

Q. What did he look like to you when he came out?

A. A wild man.

Q. Well now what do you base that on?

A. He was just staring, looking and not seeing anything.

Q. Have you had experience with people who are insane?

A. Yes, sir. I have seen them that way before.

Q. You have seen the mentally ill during your course of years as a nurse?

A. Yes, sir, I have.

Q. You say he looked like a wild man?

A. Yes, sir.

Q. Then what happened?

A. When he saw me he seemed to be coherent again.

Q. In other words he sort of snapped back?

A. He snapped back.

Q. Then what happened?

A. They handcuffed him and I was up on the landing right by him and he put his head on my shoulders and was crying and said, 'Ma, wipe my tears, Ma, wipe my tears.'"

State Trial Defense Exhibit 163.

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1973 MARYLAND TRIAL: The Vietnam War was still raging when, on May 8, 1973, petitioner stood trial in Circuit Court for Prince George's County, Maryland, Case No. 12,865, charged with one count of "murder" in connection with the Blackwell death, and four counts of "assault with intent to murder" in connection with the shots fired through the door of the apartment.

The only defense raised by defense counsel at Wayne Felde's trial was "intoxication". There was no such thing as "Post-Traumatic Stress Disorder" at the time petitioner stood trial in Maryland in 1973 and no insanity plea was entered. On May 9, 1973, petitioner was convicted on all counts and, one month later, was sentenced to a total of fifteen (15) years imprisonment and incarcerated, first, in the Maryland State Penitentiary at Baltimore and, later, at the Maryland Correctional Training Center at Hagarstown.

MARYLAND CONVICTION REVERSED: In Felde v. Maryland, 336 A.2d 826, 26 Md.App. 15 (1975), the murder conviction of petitioner was reversed by the Court of Special Appeals of Maryland. However, petitioner remained incarcerated while awaiting his new trial on the same charges.

MARYLAND PLEA BARGAIN: Petitioner's retrial had already commenced, and a trial jury had already been selected, on September 2, 1975, when, acting under the misapprehension that the sentence he would receive would enable him to be eligible for immediate release on parole, petitioner entered pleas of "guilty" to a reduced count of "manslaughter" in connection with the Blackwell death, and four reduced counts of "simple assault" in connection with the shots fired through the top of the apartment door. However, on October 3, 1975, petitioner was sentenced to a total of twelve (12) years and, being statutorily ineligible for parole, was returned to prison.

MARYLAND PAROLE DENIED: When petitioner finally did become eligible for parole on May 2, 1976, he was summarily turned down by the Maryland Parole Board in spite of the fact that he was a first offender and had a spotless prison record.

MARYLAND ESCAPE: On July 30, 1976, having been confined for over three (3) years and being aware that he would not again become eligible for parole for another year and one-half, petitioner was unable to stand further incarceration and simply walked away from the disposal plant where he was assigned to work at the minimum security facility at Hagarstown. After hiking through the mountains for several days, traveling at night and sleeping in corn fields during the day, petitioner began

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hitchhiking on the highway and eventually reached his mother's home in Louisiana.

ACTIVITIES AS A FUGITIVE: Upon arriving in Louisiana, petitioner obtained a Louisiana driver's liencse and a social security card using the alias "Harold Hershey". Although successful in obtaining several well-paying jobs while in Louisiana, petitioner, as usual, quit each one.

Following his escape, petitioner was arrested twice in Louisiana on DWI charges. After bonding out on the second charge, he left the state as DWI second offense carries a mandatory jail term in Louisiana, which would have resulted in his being fingerprinted and discovered to have been an escapee from Maryland.

Drifting aimlessly from state to state, spending most of his time in an intoxicated condition, and finally ending up in Denver, Colorado, petitioner began working as a carpenter. While in Denver, he continued to move from job to job, still unable to adjust and settle down to lead a normal life.

DEATH OF MOTHER: While living in Denver, petitioner learned that his mother was dying of cancer and, after a two-day bus ride, he arrived back in Louisiana. The day following his arrival, she was admitted to the DeSoto General Hospital in Mansfield, Louisiana. Petitioner stayed with his mother continuously in the hospital during her final days. Because of his fugitive status, petitioner's mother had, over the years since his escape from Maryland, been required to introduce him as her cousin "Harold Hershey" rather than as her son, Wayne Felde. Aware that she was dying of cancer, it was during this period of time that petitioner's mother told him that she wanted him to resume using his real name instead of the Harry Hershey alias in order that she could finally introduce him to others as her son before she died.

Although his fake driver's license in the name of Harold Hershey was still valid, petitioner obtained a new Louisiana driver's license using his real name and took it to show to his mother to prove to her that he had kept his promise to resume his true identity.

On Friday, October 13, 1978, petitioner's mother died. At her crowded funeral on Sunday, October 15, 1978, petitioner continued to go by his true identity of Wayne Felde.

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1978 LOUISIANA HOMICIDE: On October 20, 1978, one week after the death of his mom and five days following her funeral, petitioner and Larry Hall, a friend of petitioner's who had only recently arrived from Colorado with his girlfriend, Cheryl, were working as carpenters for Whitaker Construction Company at a job site on Mansfield Road in Shreveport.

Early that afternoon, petitioner's sister, Flo, a nursing student at the Shreveport campus of Northwestern State University, arrived at the job site where petitioner and Hall were working. Flo's husband had telephoned her at school to tell her that the police had come by their home looking for petitioner and she wanted to know why, thinking that it might concern his Maryland "parole". (Only petitioner and his mother were aware he was an escapee as she and petitioner had told his sisters, Maria and Flo, and their husbands, David and W. T., that Wayne had been paroled.)

Upon being advised by Flo that the police were looking for him, petitioner, without explaining anything to Flo, immediately left the job site, abandoning his automobile there and catching a ride with Flo to a Pizza Hut located further down Mansfield Road where he and Flo were a short time later joined by Hall and Cheryl in their camper.

Petitioner and Hall decided that petitioner should wait at the Pizza Hut while Hall and Cheryl followed Flo to her home in nearby Mansfield to get some camping equipment for them to use on the road. Hall and Cheryl would then return to the Pizza Hut to pick petitioner up and the three of them would then leave Shreveport and drive back to Colorado.

Petitioner wanted to have a weapon with him while he, Hall and Cheryl were on the road camping and also had plans to use it on himself if he got cornered by the police rather than allow himself to be captured and returned to the Maryland State Penitentiary. Petitioner knew that because of his behavioral disorders, Flo would never let him have one of the many guns she and her husband owned so, before Flo, Hall and Cheryl left for Mansfield, petitioner had them take him to a nearby sporting goods store where petitioner purchased a revolver and ammunition with part of his paycheck which he had cashed earlier in the day.

Upon arriving back at the Pizza Hut to drop petitioner off, Flo was very upset and crying over the fact that petitioner had purchased the gun. Petitioner's last words to Flo before she left for Mansfield was a request that, if he died, he be buried next to his mom. Flo, Hall and Cheryl then departed for Mansfield in two separate vehicles

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leaving petitioner behind at the Pizza Hut to wait for Hall and Cheryl to return. They never did.

After following Flo to Mansfield and getting her camping equipment, petitioner's "friends", Hall and Cheryl, departed for places unknown, unable to be located by defense counsel and never to be heard from again.

Petitioner meanwhile continued waiting at the Pizza Hut drinking beer, unaware that he had been abandoned by Hall and Cheryl. Flo, unaware that her brother had been deserted, had not remained at home and petitioner was unable to reach anyone by telephone.

After waiting at the Pizza Hut for several hours drinking beer, petitioner became somewhat intoxicated and, not knowing what had happened, being unable to reach anyone by telephone and being stranded without transportation, petitioner walked to a bar next door, the Dragon Lounge, and continued drinking.

Becoming more and more intoxicated and despondent with the passage of time, petitioner, while in the restroom of the Dragon Lounge, contemplated taking his own life and, while in the process of pulling his revolver out, petitioner was startled by another bar patron entering the restroom. Not knowing the gun had been seen, petitioner placed it back under his belt and jersey, walked out of the restroom, and continued drinking at the bar. Unknown to petitioner, the bar patron who had entered the restroom informed Dragon Lounge employees that he had seen petitioner's gun and a telephone call was made requesting police to come to the scene to check petitioner out.

In the meantime, petitioner continued drinking and finally deciding that something had happened to prevent Hall and Cheryl from returning to pick him up, petitioner telephoned for a taxi cab to come pick him up.

Pursuant to the telephone call from the Dragon Lounge owner, two Shreveport Police Department units were dispatched to the Dragon Lounge to check on the report of "a man with a gun". Each patrol unit contained a single uniformed officer.

Petitioner's taxi cab arrived at the Dragon Lounge parking lot shortly after the police patrol units and, as Petitioner walked out of the Dragon Lounge to get in the cab, he passed the two police officers who were searching the wrong man. As Petitioner arrived at the taxi cab, an employee of the Dragon Lounge pointed him out to the policemen who called for Petitioner to walk over to where they were standing. Petitioner obeyed and upon arriving where the officers were, allowed them to search him. Both

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officers searched Petitioner but did not do so properly and, although they found a box of bullets with five (5) bullets missing in Petitioner's back pants pocket, they failed to find the .357 magnum revolver which Petitioner had sticking in the front of his belt under the football jersey he was wearing, which was not tucked into his pants. The two police officers were willing to let Petitioner leave if the cab driver would agree to take him as fare. However, the taxi cab driver refused to do so because Petitioner was "too drunk". The police officers were then left with no choice but to arrest Petitioner for the misdemeanor offense of "Simple Drunk" and, after Petitioner's hands had been handcuffed behind his back, Petitioner was placed in the rear of one of the patrol cars. At no time during his contact with the two police officers in the parking lot outside of the Dragon Lounge did Petitioner offer the officers any resistance nor did he attempt to run from them. The lone officer in the patrol car into which Petitioner had been placed, the decedent herein, then began driving his unit down Mansfield Road toward the downtown area of Shreveport where the Shreveport City Jail and to which Petitioner was to be booked for "Simple Drunk" was located.

The decedent police officer's unit had traveled only a very short distance from the Dragon Lounge, which was still in full view, when the decedent police officer apparently noticed the handcuffed Petitioner attempting to shoot himself in the mouth with the revolver Petitioner had managed to get out of his belt. A struggle for the weapon ensued between Petitioner and the decedent police officer, with the decedent police officer leaning over the back of the front seat, while at the same time attempting to drive the automobile, during which struggle the weapon discharged four or five times within the close confines of the police unit, the windows to which were closed, resulting in a deafening roar of explosions and causing the police unit to immediately fill with gun powder smoke. During the struggle between the decedent police officer and Petitioner for the weapon, one bullet went through the rear seat and floorboard, one and possibly two bullets went into the roof of the car, two bullets went through the back of the front seat and another bullet apparently shattered the window of the driver's door of the automobile.

According to the autopsy report prepared on the decedent officer, the fatal wound to the officer was caused "bullet fragment" which veered off of a seat spring and struck the "right flank" of the decedent officer who was leaning up over the back seat struggling for the gun, resulting in "severance of the vena cava and the aorta at the

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abdominal bifurcation", causing the decedent police officer to bleed to death almost immediately.

The roaring explosions of the discharging weapon, the pervasive presence of the gunpowder smoke resulting therefrom, the stress which Petitioner was under because of the recent death of his mother only days earlier, and the fact that he had been told police were looking for him, combined with the intoxicated condition of Petitioner, causing him to dissociate and undergo a delayed-stress reaction stemming from, and reverting back to, his combat experiences in Vietnam. This was testified to at Petitioner's trial by nationally recognized experts who conducted examinations of Petitioner and diagnosed him as suffering from the psychiatric condition known as Post-Traumatic Stress Disorder which is set forth in Section 309.81 of the desk manual generally utilized by the psychiatric profession, Diagnostic and Statistic Manual III [DSM-III], which manual was first released in unfinished form in early 1980. Post-Traumatic Stress Disorder was not recognized as a legitimate anxiety disorder until only months prior to the 1980 trial of Petitioner and, at the time of the trial, the DSM-III was not in use in Louisiana hospitals and the Louisiana physicians who were appointed to the State Sanity Commission appointed by the State Judge on motion of the State Prosecutor, were completely unfamiliar with the anxiety disorder of Post-Traumatic Stress Disorder (PTSD] at the time of their psychiatric examinations of Petitioner in January of 1979. In fact, even the Veteran's Administration did not recognize PTSD as a treatable disease until October, 1980, two months after Petitioner had been convicted and sentenced to death.

Following the struggle and gunshots, the police patrol unit ultimately came to rest against a guardrail in the grass median of Mansfield Road. The decedent police officer exited the vehicle, may have opened the rear door of the police unit which could not be opened from inside, and then ran a short distance, collapsed, and died from loss of blood. Petitioner, still handcuffed, somehow managed to get out of the unit and fled the scene on foot. A veritable army of on-duty and off-duty law enforcement officers from literally all area law enforcement agencies immediately converged upon the scene and the most hysterical and extensive manhunt in the history of Shreveport ensued.

Within the hour, Petitioner, still handcuffed, was gunned down in the backyard of a nearby residence at point-blank range by blasts of buckshot fired by Shreveport police.

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Most law enforcement officers recognize an unwritten code that a person who shoots a law enforcement officer will not be taken alive. Petitioner would have died the night of October 20, 1978, but for the excellent medical staff at Louisiana State Medical Center in Shreveport, the fact that he was shot in a residential neighborhood where there were many non-civilian witnesses present after the first shotgun blasts were heard, and, finally, the fact that there is a very strong survival instinct in Petitioner which is, perhaps, a byproduct of his Vietnam combat experiences.

The State Trial testimony of Shreveport police officer J. B. McGraw, the police officer who shot Petitioner from the backyard of a neighboring residence, and the testimony of his partner, Auxilliary Shreveport police officer L. D. Humphrey, who was with McGraw at the time, are inconsistent with each other and suspect on their face. Petitioner does not remember anything concerning what occurred after the initial gunshot was fired in the police patrol unit until he regained consciousness while being treated at the Louisiana State University Medical Center. McGraw and Humphrey testified that McGraw was behind a tree and was forced to shoot Petitioner twice with buckshot because Petitioner, who was still handcuffed, had his hands in front, instead of behind, and had pointed his revolver in McGraw's direction and did not drop it when McGraw ordered him to do so.

The physical evidence and the trial testimony of others did not support the officers' version.

The buckshot holes in the wooden wall which was directly behind Petitioner when he was shot shows that the buckshot which made those holes was fired from two (2) different directions. Closeup photographs taken of the holes were introduced in evidence.

The location of Petitioner's wounds completely contradicted the police version that prior to being shot Petitioner had put his handcuffed arms in front of him and aimed his revolver at McGraw from a crouched position. Two medical report sketches entered into evidence as part of the extensive medical re[illegible]howed the location of Petitioner's wounds, none of which wounds were to his hands, wrists or forearms. In addition, the number of buckshot pellets found in the wall, found on the ground, and which hit Petitioner, establish that more than two rounds of buckshot were fired at Petitioner by police.

Most damaging to the police version of how Petitioner was shot was the State Trial testimony of defense witness Keenan Gingles, who is presently in charge of The Shreveport Times newspaper Enterprise Team of investigators, who at the time of his

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trial testimony was Public Information Officer for the Louisiana State Senate, and who, on the night of October 20, 1978, was an experienced criminal reporter for The Shreveport Times. According to Mr. Gingles, immediately before the shotgun blasts were heard, he observed a figure (which had to be Petitioner) running toward the location where Petitioner was shot and, immediately thereafter, Gingles heard shouting and a number of shotgun blasts, including two (2) which he personally saw fired by uniformed police from in front of the residence where petitioner was located when he was shot.

Officers McGraw and Humphrey both admitted that they were behind the residence, which would have placed them in a position where they could not have been seen by Gingles. The conclusion is inescapable that the police version of the shooting of Petitioner was a fabrication.

The box of bullets removed from the back pocket of Petitioner's pants when he was searched by the two police officers outside of the Dragon Lounge, were said by police to have been found in Petitioner's back pocket after he was shot and, according to the police version, even though Petitioner was handcuffed behind his back in the patrol car and was "on the run" immediately prior to being shot himself, Petitioner is somehow supposed to have managed to have retrieved the box of bullets before exiting the patrol unit, opened the box, removed enought bullets to reload his weapon (which the police said he had reloaded and had bullets in it when Petitioner was shot), closed the box, reload his revolver, and put the closed box back in his back pants pocket, all while handcuffed and before being shot.

Although, according to police, Petitioner's revolver was loaded and cocked when he was shot twice by McGraw, Petitioner's revolver did not fire or go off prior to or while Petitioner was being shot. A photograph of Petitioner's revolver at the scene shows from drops of Petitioner's blood on the hammer that the hammer was cocked after the blood dripped onto it as there is a distinct line between the bloody and unbloody area of the hammer showing that the part of the hammer which is not exposed when the gun is uncocked did not have any blood on it and that, therefore, when the blood dripped onto the hammer, it was uncocked.

In addition, a physical examination of currency which was in Petitioner's front pants pocket at the time he was shotgunned, and the buckshot pellet holes in the money, contradict the police version of Petitioner's position at the time he was shot.

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In addition, a police photograph taken of Petitioner shortly after he was shotgunned by the police may have confirmed the fact that Petitioner's hands were still handcuffed behind him at the time he was shot but that photograph was withheld and suppressed by the State despite defense efforts to procure its production by way of motions and subpeonas.

By the time police decided to call an ambulance to transport Petitioner to the hospital, he was almost dead. Critically wounded by twenty-seven (27) .00 buckshot pellets, Petitioner was transported across town to Louisiana State Medical Center where he was treated for gunshot wounds to the chest, abdomen, and lower extremities; abdominal abscess; fracture of the left tibia; fracture and gunshot wound in the right ankle; perforations of the stomach, small bowel, right colon, Sigmoid colon, right kidney, right lobe of the liver, spleen, and pancreas; and acute renal failure. Surgery was performed, including: an exploratory laparotomy; a spelectomy; removal of part of the liver; a right colectomy; right nephrectomy; suture of perforations of the stomach and small bowel; drainage of the pancreas; a left Sigmoid colostomy; and a shunt in the left ankle. Accoring to the LSUMC medical reports on Petitioner, which exceeds 700 pages, almost half of Petitioner's blood was replaced by transfusions shortly following his arrival at the emergency room.

In addition to suffering a great deal of prolonged pain and discomfort, Petitioner was crippled and partially paralyzed in his lower right leg and foot, the ankle of which was shattered by a buckshot pellet, and, even now, on Death Row at the Louisiana State Penitentiary at Angola, Petitioner continues to suffer severe, and at times excruciating, pain from an inoperable damaged sciatic nerve and cannot walk without a cane or other support.

CUSTODIAL MISTREATMENT: During his three month hospitalization at LSUMC, Petitioner was constantly guarded by fellow officers of the dead Shreveport police officer and was repeatedly subjected to profanity, threats, harrassment and intimidation. Despite his deteriorated physical condition, Petitioner was shackled hand and foot to his hospital bed by shackles which were frequently and purposely overtightened. The shackles on Petitioner's damaged ankle was often intentionally jerked by various Shreveport police officers in order to cause Petitioner to suffer excruciating pain. The lights in the hospital room were never turned off and, when on occasion Petitioner was able to fall asleep, he would frequently be awakened by an officer jerking on his leg shackle and jostling his mattress.

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On one occasion, a letter from Petitioner's sister and an enclosed snapshot of the gravesite of Petitioner's mother, who had died of cancer only seven days prior to the October 20, 1978, incident, was torn up in front of Petitioner and thrown into the garbage can by one of the Shreveport policemen who was guarding him.

During the first two months of Petitioner's hospitalization, he was held incommunicado and was not even permitted visits from his immediate family members. The then, but since retired, Chief Justice of the Louisiana Supreme Court, Honorable Joe Sanders, personally contacted the State Prosecutor on December 8, 1978, and only then were family visits permitted. Even after the initial contact by the Chief Justice, Petitioner's family was cursed and abused by Shreveport police officers at the hospital causing the Chief Justice to make yet another contact with the State Prosecutor about the matter.

On November 15, 1978, while Petitioner was still hospitalized, and after it was discovered that he would not die from the extensive buckshot wounds he received, the Caddo Parish District Attorney personally obtained an indictment charging Petitioner with the capital offense of "First Degree Murder".

On January 15, 1979, Petitioner was transferred to the Caddo Parish Jail, despite the fact that he was still incapacatated from the buckshot wounds and from the ensuing operations which he had undergone while hospitalized. Upon his initial incarcaration in the Caddo Parish Jail, Petitioner was not even able to walk.

For the next fifteen (15) months, Petitioner was incercerated with another prisoner in a dank, windowless, dimly-lit, two-man jail cell measuring 8' x 6', with open floor space of only 4' x 2' because of the wall bunkbeds and bathroom facilities in the cell, with no opportunity whatsoever for exercise or sunlight.

During the portion of Petitioner's incarcaration in the Caddo Parish Jail prior to the July 13, 1979, entry of present defense counsel into the case, Petitioner frequently missed regularly scheduled medical appointments at the Louisiana State University Medical Center due to the failure of jail deputies responsible to transport him to the medical center. On those occasions when Petitioner was transported to the medical center for his appointments, the rear seats of the transportation van would be removed by the transportation deputies who would place Petitioner and his wheelchair in the rear of the van and drive to and from the medical center in such a reckless and haphazard manner that Petitioner could not control the wheelchair which would wildly roll

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to and fro slamming against the inside walls of the van and often causing the wheelchair to topple over with Petitioner in it.

The colostomy bags furnished Petitioner in his cell were often punctured by a young jail deputy whose father was a ranking Shreveport police officer, resulting in Petitioner undergoing the dehumanizing experience of having his human waste leak from the colostomy bags upon himself and his bedding.

Caddo Parish jail deputies also delayed for over two months in obtaining the proper orthopedic brace prescribed for Petitioner's crippled leg, regularly denied Petitioner his prescribed medication, including that prescribed for pain, and failed for days at a time, on some occasions for over a week, to have Petitioner's pain medication prescription refilled -- a problem which persisted until Petitioner's present defense counsel filed a federal civil rights action in United States District Court on Petitioner's behalf.

The harrassment to which Petitioner was subjected by Caddo Parish jail deputies, in addition to the previously mentioned physical abuse, also included subtle mental intimidation in the form of vulgar and profane taunts and threats and, on occasion, even included delaying Petitioner's outgoing mail to his family for up to a week at a time causing them much worry and concern and, consequently, causing Petitioner increased emotional strain and distress.

There was almost no out-of-court contact, and very little in-court contact between Petitioner and his court-appointed counsel and Petitioner's attempts to get his court-appointed counsel to help him were unsuccessful.

The State Judge twice denied written requests by Petitioner that his court appointed counsel be replaced by experienced criminal defense counsel.

The situation regarding Petitioner's lack of effective legal representation deteriorated to such an extent that Petitioner in desperation wrote letters at random to attorneys whose addresses he extracted from the yellow pages of telephone directories, seeking legal representation and asking them for help. In fact, a copy of one of those letters was filed in the State Court Record by the State Prosecutor pursuant to defense pretrial discovery motions.

STATE SANITY COMMISSION: It was under such circumstances of incarceration that Petitioner, who had only four (4) days earlier been transferred from the hospital to the jail, and who was unable to walk, was, on January 19, 1979, handcarried by two jail trustees from the seventh floor jail down to the second floor courtroom in the Caddo

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Parish Courthouse for his arraignment and the appointment of the State Sanity Commission.

Without prior consultation with, but upon the instructions of his civil court-appointed defense counsel, petitioner entered a dual plea of "Not Guilty and Not Guilty by Reason of Insanity" and, on motion of the State prosecutor, and without objection from court-appointed defense counsel, a State Sanity Commission was appointed by the presiding State Judge to conduct psychiatric examinations of the emaciated and pain-wrecked petitioner. Appointed to the State Sanity Commission by the State Judge were: 1.) Dr. N. L. Mauroner, the head of the State mental health center located in Shreveport who had recently been a Deputy Caddo Parish Coronor and who currently was paid by the Caddo Parish Coronor for performing autopsies; and, 2.) Dr. Fred Marceau, the elderly head of the State mental health center in Lafayette who had formerly headed the State mental health center in Shreveport who was also an ex-Deputy Caddo Parish Coronor; and, 3.) Dr. Robert Braswell, the Caddo Parish Coronor, a general practitioner, who had personally performed the autopsy on the decedent in the case on the night he died.

The coercive atmosphere created by the custodial duress and mistreatment previously detailed herein set the tone for the custodial pretrial examinations (interrogations) conducted of Petitioner in a small windowless room of the Caddo Parish Jail by the three Louisiana physicians on the State Sanity Commission.

The pitiful emaciated condition of Petitioner at the time of his examinations by the State Sanity Commission members is graphically evidenced by the full body "mug shot" photograph taken of Petitioner upon his arrival at the Caddo Parish Jail from the hospital, shortly prior to his Sanity Commission examinations. State Trial Defense Exhibit No. 98.

All three physicians examined Petitioner separately within a short time after their appointment to the State Sanity Commission.

Although the State Sanity Commission went to the office of the State Prosecutor and reviewed the prosecution file and police reports prior to examining Petitioner, no contact was made by the Sanity Commissionees with court-appointed defense counsel either before or after their examinations of Petitioner.

At the time the State Sanity Commission physicians examined Petitioner, he had received from court-appointed defense counsel no preparation whatsoever for, or advice

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on the nature and ramifications of, the psychiatric examinations by the State Sanity Commission.

Court appointed defense counsel received no prior notificaiton whatsoever of the time and location of the pretrial custodial psychiatric examinations (interrogations) to be made of Petitioner by the State Sanity Commission members and was not afforded ample opportunity to prepare Petitioner for his examination.

Regardless of the issue of prior notice of defense counsel, Petitioner in fact failed to receive any legal assistance, advice or consultation from court-appointed defense counsel in deciding whether or not to submit to the examinations and was not advised by his assigned counsel as to how the findings of the State Sanity Commission physicians could be utilized against him in his case.

In actuality, Petitioner did not even know he had the option to refuse to be examined, given the complete absence of any legal assistance or advice from his appointed defense counsel.

Petitioner was not advised by anyone prior to the psychiatric examination that he had the right to remain silent and that, if he gave up that right, anything he said could be used against him.

Given the total absence of any advice or assistance from, or consultation with, court-appointed defense counsel regarding the psychiatric examination issue, and given Petitioner's understandable, but total, lack of knowledge concerning the subject, Petitioner was simply incapable of making a valid waiver of his right to effective assistance of counsel or of his right against self-incrimination, in that regard.

The first State Sanity Commission member to examine Petitioner was Dr. Fred Marceau who did so on only one occasion, January 31, 1979, for approximately one hour.

Dr. Marceau is a fine and reputable person but has a very poor memory, perhaps attributable to his advanced age. [Dr. Marceau's poor memory was clearly revealed during his State Trial testimony in this case when, pursuant to a juror request for more background information about his qualifications, the doctor could not remember enough to testify to and was forced to ask his wife, who had driven him to the Courthouse, to write his prior experiences and positions held down for him on a sheet of paper during a recess, and when the trial resumed, Dr. Marceau read his qualifications to the jury from the notes prepared for him by his wife. State Appellate Record; Volume V, p. 1153, ll. 11-25.]

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Dr. Marceau misrecollected at the State Court Trial that at the time of the examination Petitioner had a "well-groomed appearance". The January 15, 1979, photograph taken of Petitioner upon his arrival from the hospital, shortly prior to Dr. Marceau's examination, reflects exactly the opposite. See: State Trial Defense Exhibit 98.

In addition, although Petitioner was crippled and needed crutches to walk with, Dr. Marceau could not recall him using any walking aids and in fact recalled Petitioner to have been in good physical condition. State Appellate Record; Volume V, pp. 1147, 1148.

Although the normal reporting procedure utilized by State Sanity Commission members in Caddo Parish is for the member to forward a brief written report in the form of a letter to the State Judge and include therein only his ultimate opinion relative to sanity and present capacity, as did Drs. Braswell and Mauroner, Dr. Marceau for some reason did not follow the normal procedure in this case.

In lieu of the usual brief report in letter from to the State Judge, Dr. Marceau prepared an unusually lengthy and detailed narrative of factual details of the October 20, 1978, incident, which information he recalled obtaining from Petitioner but much of which may well have inadvertently been taken from notes made while reviewing the file and police reports of the State Prosecutor, as Petitioner did not furnish Dr. Marceau with much of the information he misrecollected as having obtained from Petitioner.

To make matters worse, instead of forwarding the report to the State Judge as is customary, Dr. Marceau mailed it to the "Criminal Minute Clerk" who filed it in the record of the case thereby affording the State Prosecutor full access to confidential and privileged information. Had the report been forwarded to the State Judge pursuant to the normal procedures, all information except the ultimate opinions of Dr. Marceau as to sanity and present capacity would have been ordered expunged by the State Judge prior to the report being filed in the record or, in the alternative, the State Judge would have returned the report to Dr. Marceau and requested that he submit another report in proper form.

Dr. Marceau's departure from the normal procedure in effect transformed him from a "neutral" examiner into a "policeman". Petitioner had made no statements concerning the offense to anyone during the three months prior to being examined by Dr. Marceau and, by handling the matter in such an unorthodox fashion, Dr. Marceau

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furnished the State Prosecutor with a purported "confession" which the State Prosecutor otherwise would have never had. This in turn enabled the State Prosecutor to intentionally misuse the material at the 1980 trial in order to obtain Petitioner's conviction.

Like Dr. Marceau, Dr. Mauroner testified that Petitioner's memory was vague and there were gaps in what he recalled. State Appellate Record; Volume X, p. 2175. Dr. Mauroner further testified that it would be difficult for Petitioner to separate what he read and what he was told from what he actually remembered and that he could not say that the facts he got from Petitioner actually came from Petitioner's memory. State Appellate Record; Volume X, pp. 2181, 2182.

Unlike Dr. Marceau, who remembered Petitioner being in pretty good shape, Dr. Mauroner, who is much younger and obviously quite a bit more mentally alert than Dr. Marceau, testified that Petitioner was in terrible shape physically and also complained of considerable pain. State Appellate Record; Volume X, p. 2185. Dr. Mauroner further testified that incarceration, severe wounds, and mental and physical harrassment by jailers, could have caused considerable stress in Petitioner. State Appellate Record; Volume X, p. 2180. When Dr. Mauroner examined Petitioner, he had no knowledge of Post-Traumatic Stress Disorder and had no experience dealing with veterans suffering from Post-Traumatic Stress Disorder. State Appellate Record, Volume X, p. 2175.

Dr. Mauroner did not probe into Petitioner's Vietnam combat experiences and got all of the background material which he had on Petitioner from the State Prosecutor when he reviewed the prosecution file and police reports prior to interviewing Petitioner. State Appellate Record; Volume X, p. 2175, 2179, 2180, 2182, 2184.

Although Petitioner left too many blanks in the MMPI for Dr. Mauroner to grade it, Petitioner's non-completion of the MMPI could have been due to mistrust of Dr. Mauroner or because Petitioner had no recollection or was confused or ambivalent concerning the occurrences of October 20, 1978, during which the officer was fatally wounded and Petitioner was seriously wounded. State Appellate Record; Volume X, pp. 2213, 2214.

The opinion of Dr. Mauroner that Petitioner was sane was especially damaging to Petitioner's case as subsequent to the return of the unfavorable jury verdict, it was learned that Dr. Mauroner was the witness with whom a psychiatric social worker on the Trial Jury had had a professional relationship.

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The other Sanity Commission member to examine Petitioner was Dr. Braswell, the Coronor, who is not a psychiatrist and had no knowledge whatsoever of PTSD. Petitioner complained to Dr. Braswell about the jailers not giving him his medication and that he was in considerable pain from his smashed leg and damaged sciatic nerve. Dr. Braswell, however, like Dr. Mauroner, took no action to check with anyone in the jail or anywhere else to see about getting Petitioner's medication problems straightened out.

The fact that none of the State Sanity Commission members was familiar with PTSD at the time each of them examined Petitioner was unfortunate but understandable since it was still being researched and had not yet been published in the DSM-III.

Post-Traumatic Stress Disorder had not been recognized as such at the time Petitioner was sent to prison for the 1972 Maryland homicide. Had it been, the outcome of that case might have been drastically different.

Post-Traumatic Stress Disorder likewise had not been recognized as such at the time of the 1978 Louisiana homicide or at the time of Petitioner's examinations by the State Sanity Commission members in this case. Had it been, the outcome of this case might also have been drastically different.

The DSM-III, in which PTSD was first recognized as a legitimate anxiety disorder had just been released at the time of the 1980 State Trial, was not even in use in Louisiana hospitals until 1981, after Petitioner had been convicted and sentenced to death.

MARCEAU REPORT SUMMARIZATIONS: The defense immediately objected when, during the testimony of State Sanity Commission member Marceau at the 1980 Louisiana homicide trial of Petitioner, the State Prosecutor attempted to examine Dr. Marceau concerning the details of the contents of the sanity Commission report of Dr. Marceau which set forth non-verbatim summarizations of inculpatory statements purportedly made by Petitioner to Dr. Marceau during their one (1) hour meeting in the Caddo Parish Jail on January 31, 1979. State Appellate Record; Volume V, p. 1152, ll. 7-22.

A recess was called by the State Judge in order to afford defense counsel an opportunity to locate caselaw in support of the defense objection. State Appellate Record; Volume V, p. 1152, l. 23 - p. 1153, l. 8.

Upon locating the sought after opinions, defense counsel presented them to the State Judge and the State Prosecutor for their consideration. After both the State Prosecutor and the State Trial Judge had thoroughly reviewed the contents, detailed

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argument on the principles of law set forth therein, and their applicability to defense counsel's objection, was had outside the presence of the trial jury. State Appellate Record; Volume V, pp. 1155-1171.

When trial resumed in the presence of the Trial Jury, the State Trial Judge sustained the defense objection on Fifth Amendment grounds. State Appellate Record; Volume V, p. 1172.

The State Prosecutor then abandoned his pursuit of that line of questioning for the remainder of Dr. Marceau's trial testimony. Though available, Dr. Marceau was not recalled to the stand by either side during the remainder of the trial and at no time during the entire trial did the State Prosecutor ever attempt to lay a proper foundation showing that the information purportedly communicated to Dr. Marceau by Petitioner, and set forth in the State Sanity Commission Report of Dr. Marceau, was "freely and voluntarily" communicated to Dr. Marceau.

Following the trial testimony of Dr. Marceau, the State Prosecutor did not again attempt to present the protected State Sanity Commission material to the Trial Jury until he was approximately five-sixths of the way through his cross-examination of Petitioner. State Appellate Record; Volume X, p. 2141, ll. 29-30.

When during his cross-examination of Petitioner, the State Prosecutor was in the process of constructing an improper assertive question by attempting to read an entire paragraph directly from the State Sanity Commission report of Dr. Marceau which the State Prosecutor was holding in his hands about two feet directly in front of the jury box, defense counsel once again interrupted the question of the State Prosecutor and objected to its form. State Appellate Record; Volume X, p. 2142, ll. 3-28. The State Judge advised defense counsel that the Court could not require the State Prosecutor to forego asking questions in such form, at which time defense counsel reurged his objection to the form of the question and, upon the overruling of the objection by the State Judge, defense counsel noted an Assignment of Error. State Appellate Record; Volume X, p. 2143, ll. 1-16.

Following the refusal of the State Judge to control the form of the questions propounded to Petitioner by the State Prosecutor on cross-examination, the State Prosecutor proceeded to, in effect, testify to the Trial Jury himself by propounding to Petitioner several blatantly assertive questions which incorporated constitutionally protected State Sanity Commission material purportedly furnished to Dr. Marceau by

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Petitioner. In doing so, the State Prosecutor read directly from the State Sanity Commission report of Dr. Marceau while holding it in his hands directly in front, and in the plain view, of the Trial Jury. State Appellate Record; Volume X, p. 2144, ll. 23-26, p. 2144, l. 31 - p. 2145, l. 2, p. 2145, ll. 5-7.

Following the third such assertive question testified to and read by the State Prosecutor to Petitioner, defense counsel objected and was forced to request that argument on the defense objection be had outside the presence of the Trial Jury, pursuant to which request the trial jurors were removed from the courtroom. State Appellate Record; Volume X, p. 2145, ll. 1-18. Following removal of the Trial Jury from the courtroom, defense counsel cited the Fifth Amendment to the United States Constitution as the legal basis of the defense objection to the utilization by the State Prosecutor of constitutionally protected information purportedly communicated by Petitioner to Dr. Marceau in his capacity as a member of the State Sanity Commission appointed by the State Judge on motion of the State Prosecutor on January 19, 1979. State Appellate Record; Volume X, pp. 2147, 2148. However, the State Trial Judge overruled the defense objection, to which ruling defense counsel noted an Assignment of Error and stated as grounds therefor the defense position that, although the Fifth Amendment may have been waived in certain aspects by Petitioner upon taking the stand to testify, it was definitely not totally waived as to the statements purportedly made by Petitioner to State Sanity Commission member Marceau during the one hour psychiatric evaluation of January 31, 1979, conducted in the Caddo Parish Jail. Defense counsel further noted as grounds for the Assignment of Error, the form in which the State Prosecutor was being permitted to phrase the questions he was propounding to Petitioner on cross examination, reiterating the already overruled defense objection that the phrasing of the questions in such a manner by the State Prosecutor amounted to nothing less than him testifying to the Trial Jury regarding the facts set forth by Dr. Marceau in his State Sanity Commission report which at no time during the entire State Trial was ever offered or introduced into evidence, following which defense statement the State Judge noted that defense counsel had made his objection and had it in the record. State Appellate Record; Volume X, pp. 2149-2150.

Upon the return to the courtroom of the Trial Jury, the cross-examination of Petitioner by the State Prosecutor continued in the same manner as before with the State Prosecutor testifying to the Trial Jury through the use of assertive questions, the

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contents of which he was obviously reading from the State Sanity Commission report of Dr. Marceau, in plain view of the Trial Jury, despite the fact that the information which the State Prosecutor was, in effect, testifying to, had never been, and never was, offered or introduced into evidence at the State Trial.

So effective were the testimonial assertive questions which the State Prosecutor was permitted by the State Judge to ask with regard to the Marceau report, that the State Prosecutor did not even bother to call Dr. Marceau as a State rebuttal witness in an attempt to legally introduce the contents of the Marceau report into evidence. State Appellate Record; Volume X, pp. 2150-2151.

Following the action of the State Trial Judge in overruling the defense objection to the utilization of the Marceau report in assertive questions propounded by the State Prosecutor, the State Prosecutor proceeded to ask six (6) more such questions which he was obviously reading almost verbatim from the Marceau report. State Appellate Record; Volume X, p. 2150, ll. 6-8, 15-20, 22-26, 28-20; p. 2151, ll. 15-22, 30; p. 2152, l. 2.

Absolutely no one, neither Dr. Marceau nor Petitioner nor any other witness who appeared at the State Trial, testified that Petitioner had at any time stated "pull the car over, I have a gun". The only person who testified at the State Trial regarding a statement which came anywhere close to that was the State Prosecutor himself who, in propounding the assertive questions utilizing constitutionally protected information from the Marceau State Sanity Commission report, stated "do you recall telling Dr. Marceau that you vaguely remembered pointing the gun at the police officer and telling him to stop and let you out...". State Appellate Record; Volume X, p. 2150, ll. 15-17.

Moreover, despite the fact that such a statement, or even a similar statement, had never been introduced into evidence at the State Trial, the State Prosecutor, in his closing arguments to the Trial Jury, presented as facts, matters which only the State Prosecutor had testified to in his assertive questions, to wit, that Petitioner had told Dr. Marceau "some things that only the persons in that car would be aware of, like 'Pull the car over, I have a gun.'" -- even though the State Prosecutor well knew that at no time during the State Trial was such a statement ever introduced as legal competent evidence. State Appellate Record; Volume X, p. 2230.

Apparently uncertain that victory was his following the defense closing argument to the Trial Jury, the State Prosecutor in his rebuttal argument to the Trial Jury, again

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referred to the information that he, himself, had testified to in his assertive questions propounded to Petitioner on cross-examination, regarding the statements purportedly made by Petitioner to Dr. Marceau, but which were never at any time legally and properly admitted into evidence in the case.

The following statements were made by the State Prosecutor to the Trial Jury in his closing and rebuttal arguments:

> "He examined the Defendant on January 31st, 1979, approximately four months after the incident, and we submit approximately four months after the incident, because it is before the Defendant learned of the possibility of asserting a delayed stress defense. Dr. Marceau examined the Defendant, discussed the fact that the Defendant had been to Viet Nam, discussed the Defendant's drinking problems, the Defendant indicated extreme intoxicaton, and, thus, under some circumstances, not responsible for his actions, gave certain details of the offense that are not consistent with an alcohol blackout or consistent with a psychotic break or a break from reality, claimed he did not know for sure what he remembered as opposed to what he was told; but told him some things that only the persons in that car would be aware of, like, 'Pull the car over, I have a gun.'" [Emphasis supplied]. Record; Volume X, p. 2250.
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> "And either the doctor made it up or someone made it up and it does not fit in any way as an incriminating piece of evidence in this case that he pulled the gun and told the policeman to pull over, back in January of 1979, when Dr. Marceau spoke with the Defendant. It doesn't fit in any way at that time as incriminating evidence. In fact, it would have been more incriminating for somebody to tell him he pulled the gun and started executing the policeman. But, see, the truth is, obviously, the Defendant told Dr. Marceau what he recalled at the time, four months after the incident." Record; Volume XI, p. 2344. [Emphasis supplied]

The State Prosecutor was certainly aware of the legal principles and implications surrounding his representation to the Trial Jury in argument that Petitioner had made highly inculpatory statements to Dr. Marceau that Petitioner had intentionally pointed the revolver at the policeman and told him to pull the car over because Petitioner had a gun. The State Prosecutor was well-aware that at no time had anyone, at any time during the trial, legally testified that such a statement had been made by Petitioner. The only person in the courtroom throughout the entire trial who testified, albeit illegally, that such a statement had been made by Petitioner was the State Prosecutor himself, in his highly improper and prejudicial assertive testimonial questions propounded to Petitioner on cross-examination, which questions the State Prosecutor was permitted to ask by the State Trial Judge, but only after several previous objections and thorough legal arguments on the principles of law involved had already been had during the course of the proceedings. State Appellate Record; Volume V, p. 1152, l. 7 - p. 1153, l. 8, pp. 1155-1172; Volume X, p. 2142, l. 10 - p. 2143, l. 16, p. 2145, l. 1 - p. 2149.

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THE LOUISIANA SUPREME COURT DECIDED THE FEDERAL QUESTION PRESENTED FOR REVIEW IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT

The Louisiana Supreme Court erred in upholding the conviction and death sentence of Petitioner despite the extremely prejudicial and unconstitutional trial utilization, over defense objections, by the State Prosecutor of a non-verbatim summarization of post-indictment inculpatory statements purportedly obtained from Petitioner during a custodial pretrial psychiatric examination (interrogation) by a member of the State Sanity Commission appointed by the State Judge on motion of the State Prosecutor, where the non-verbatim summarization of the purported statements utilized at trial by the State Prosecutor: 1.) Was neither offered nor admitted into evidence thereby effectively depriving Petitioner of his Sixth Amendment right to confrontation and his Fourteenth Amendment right to due process of law; 2.) Was obtained from Petitioner in violation of the procedural Miranda advice of rights requirements; 3.) Was not shown to be reliable and trustworthy for Fifth and Fourteenth Amendment purposes; 4.) Was obtained from Petitioner in violation of his Fifth and Fourteenth Amendment rights to freedom against self-incrimination and to due process of law in light of Petitioner's deteriorated physical and medical condition and mental and emotional state, and the barbaric conditions and coercive atmosphere of his confinement, at the time the statements were purported to have been obtained, all of which factors necessarily precluded Petitioner from having the mental competence and ability necessary to freely and voluntarily furnish such statements, the free and voluntary character of which was never shown; 5.) Was obtained from Petitioner in violation of his Sixth Amendment right to counsel; and, 6.) Was not harmless, and was not declared by the Louisiana Supreme Court to be harmless, beyond a reasonabel doubt.

ARGUMENT

The post-indictment inculpatory statements purportedly obtained from Petitioner by Dr. Marceau were legally unavailable to the prosecution for impeachment purposes. New Jersey v. Portash, 440 U.S. 450, 59 L.Ed.2d 501, 99 S.Ct. 1292 (1979).

In Portash, prosecution utilization of immunized grand jury testimony was prohibited by this Court which stressed that where a constitutional right is involved, the

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balancing approach approved in Harris v. New York, 401 U.S. 222, 28 L.Ed.2d 1, 91 S.Ct. 643 (1971), in the context of a Miranda violation is "impermissible". Id., at 459, 59 L.Ed. 2d at 510.

> The Fifth and the Fourteenth Amendments provide that no person "shall be compelled in any criminal case to be a witness against himself." As we reaffirmed last Term, a defendant's compelled statements, as opposed to statements taken in violation of Miranda, may not be put to any testimonial use whatever against him in a criminal trial. "But any criminal trial use against a defendant of his involuntary statement is a denial of due process of law." (Emphasis in original.) Mincey v. Arizona, 437 U.S. 385, 398, 57 L.Ed.2d 290, 98 S.Ct. 2408.
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> The Fifth and Fourteenth Amendments provide a privilege against compelled self-incrimination, not merely against unreliable self-incrimination. Balancing of interests was thought to be necessary in Harris and Hass when the attempt to deter unlawful police conduct collided with the need to prevent perjury. Here, by contrast, we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible. Id.

When the use of a defendant's prior statement would be a clear violation of his Fifth Amendment rights, such testimony cannot be used even for impeachment purposes. Although a statement taken in violation of a defendant's Miranda rights can be used for impeachment purposes, a statement taken in violation of a defendant's constitutional rights cannot, because Miranda rights can be balanced against the need to deter perjury, but "[b]alancing ...is impermissible" where constitutional privileges are at issue. Id., at 459, 59 L.Ed.2d at 510.

Throughout the course of his prosecution, Petitioner has steadfastly challenged both the accuracy and the admissibility of the purported statements of petitioner contained in the report of Sanity Commission member Marceau.

In this case as in Portash, " ...the State has overlooked a crucial distinction between those [Harris and Hass] cases and this one. In Harris and Hass, the Court expressly noted that the defendant made 'no claim that the statements made to the police were coerced or involuntary' Harris v. New York, supra, at 224, 28 L.Ed.2d 1, 91 S.Ct. 643; Oregon v. Hass, supra, at 722-723, 43 L.Ed.2d 570, 95 S.Ct. 1215. That recognition was central to the decisions in those cases." Id.. at 458, 459, 59 L.Ed.2d at 510, 99 S.Ct. 1292 (1979).

The concurring opinion of Justice Powell with whom Justice Rehnquist joined, further illuminated the aforementioned principles set forth in the majority Portash opinion authored by Justice Stewart:

> The Court has referred to two quite different interests in determining whether the Fifth Amendment permits a defendant's statements to be used against him at trial. In Harris v. New York, 401 US 222, 28 L.Ed.2d 1, 91 S.Ct. 643 (1971), the Court emphasized the trustworthiness of a suspect's statements made to police, noting that there was no indication that the statements were "coerced or involuntary." Similarly, here there is no reason to question the veracity of the respondent's grand jury testimony. The Court today recognized, however, that the privilege against self-incrimination protects against more than just the use of false or inaccurate statements against a criminal defendant. In addition, the Fifth Amendment, by virtue of its incorporation through the Fourteenth Amendment, prohibits a State from using compulsion to extract truthful information from a defendant, when that information is to be used later in obtaining the individual's conviction. Id., at 463, 59 L.Ed.2d at 512-513.

Given all of the circumstances set forth in detail at pages 25-31, infra, confirming the physical, mental and legal plight of Petitioner at the time of his January 31, 1979, psychiatric examination by Dr. Marceau, it is submitted that the trial utilization of the inculpatory statements purportedly made by Petitioner was violative of his Fifth Amendment rights as the purported statements were not shown to have been freely and voluntarily made.

Petitioner was not advised before his pretrial examination by Sanity Commissioner Marceau that he had a right to remain silent and that any statement he made could be used against him at the trial. The defendant's purported statements to Sanity Commission member Marceau were therefore not freely and voluntarily made, in light of the compelling nature of his custodial psychiatric examination ordered by the Court on motion of the State, and their utilization at trial by the prosecution violated the defendant's Fifth Amendment privilege against self-incrimination.

The circumstances leading up to and surrounding the pretrial psychiatric examinations of Petitioner by the Sanity Commission members, ordered by the Court on motion of the State, clearly evidenced the fact that any statements purportedly made by the Petitioner during said custodial pretrial interrogations, were neither freely nor voluntarily made without the Petitioner having first been advised of his procedural Miranda Rights and in violation of the Petitioner's constitutional right to the effective assistance of counsel.

> The Miranda decision was designed to protect a putative defendant against the compulsion to incriminate himself arising from an official custodial interrogation. That compulsion can occur, however, from an interrogation conducted by a court-appointed psychiatrist as well as a police officer. The Smith decision merely recognized that a custodial interrogation conducted by a court-appointed psychiatrist raised the same concerns as a custodial interrogation conducted by a police officer and therefore must be preceded by the same warnings Miranda requires a police officer to give. Battie v. Estelle, 655 F.2d 692, 699 (5 Cir. 1981)

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At the time of the pretrial psychiatric examinations of the Petitioner by the members of the State Sanity Commission, the Petitioner was incarcerated and the examinations constituted custodial interrogations for Miranda purposes. The members of the Sanity Commission having been appointed by the Court on motion of the State alone, the custodial interrogations were conducted by state agents. At no time was petitioner counseled by anyone as to the ramifications of said examinations nor was petitioner ever advised by the examining state agents of his Fifth Amendment privilege against compelled self-incrimination.

The State utilized Petitioner's unwarned statements to establish guilt and to undermine the insanity defense. In Felde, as in Estelle, the State carried its burden of proof through the utilization of unwarned statements purportedly made by Petitioner who, at the time, was unaware he was assiting the prosecution to convict him.

Petitioner was indeed "made '"the deluded instrument of his own conviction,"' Culombe v. Connecticut, supra, at 581, 62 L.Ed.2d 1037, 81 S.Ct. 1860, quoting 2 Hawkins, Pleas of theCrown 595 (8th ed. 1824)...". Estelle v. Smith, supra, at 462, 68 L.Ed.2d at 396.

As held by the United States Court of Appeals for the Fifth Circuit in the Estelle v. Smith decision, 602 F.2d 694 (1979), rendered prior to this Court's decision therein, a State "may not use evidence based on a psychiatric examination of the defendant unless the defendant was warned, before the examination, that he had a right to remain silent; was allowed to terminate the examination when he wished; and was assisted by counsel in deciding whether to submit to the examination." Id., at 709.

Contributing to the deprivation of Petitioner's right to effective assistance of counsel was the decision of the Louisiana Supreme Court in State v. Jones, 359 So.2d 95 (La. 1978).

In Jones, an examining sanity commission physician made a summary of the accused's psychiatric examination statements available to the prosecutor. The Louisiana Supreme Court, referring to this conduct as constituting "improper action" and an "impropriety" stated:

> Further, the trial court found no showing made that the state had used the accused's statements improperly furnished to it in order to obtain evidence or subvert her defense or to cross-examine her. In the absence of such prejudice, or in the absence of any showing of a consistent course of conduct by the state so to misuse sanity commissions, we do not believe appellate relief can be afforded the accused in this instance. Id., at 97.

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Based on the foregoing language utilized by the Louisiana Supreme Court in Jones, defense counsel for Petitioner concluded that such statements of the accused, as had been "improperly furnished" to the prosecution, could not be utilized to "subvert" the insanity defense and, in addition, could not be used in the cross-examination of the defendant. Jones further indicated that should such "misuse" of a sanity commission occur Petitioner would be entitled to relief from whatever prejudice may eminate as a result thereof.

Any statements taken from Petitioner by Dr. Marceau in violation of the advice of rights requirements of Miranda were not admissible because it was not a situation where "trustworthiness ...satisfies legal standards" Harris v. New York, supra, 401 U.S. at 224.

An accused has a constitutional right to have counsel present during custodial interrogation. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

A defendant is entitled to "the assistance of his attorney in making the significant decision of whether to submit to the [psychiatric] examination and to what end the psychiatrist's findings could be employed." Estelle v. Smith, supra, at 471, 68 L.Ed.2d at 374.

> Because "[a] layman may not be aware of the precise scope, the nuances, and the boundaries of his Fifth Amendment privilege," the assertion of that right "often depends upon legal advice from someone who is trained and skilled in teh subject matter." Maness v. Meyers, 419 US 449, 466, 42 L.Ed.2d 574, 95 S.Ct. 584 (1975). As the Court of Appeals observed, the proposed psychiatric evaluation is "literally a life or death matter" and is "difficult . . . even for an attorney" because it requires "a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, [and] of possible alternative strategies at the sentencing hearing." 602 F.2d, at 708. It follows logically from our precedents that a defendan should not be forced to resolve such an important issue without "the guiding hand of counsel." Powell v. Alabama, supra, at 69, 77 L.Ed. 158, 53 S.Ct. 55, 84 ALR 527. Id.

Defense counsel must receive notification, and be afforded ample opportunity to prepare his client accordingly, prior to the defendant undergoing a psychiatric examination at the hands of an examining psychiatrist. Estelle v. Smith, supra.

A statement taken in violation of an accused's Sixth Amendment rights should be treated in the same fashion as a statement taken in violation of an accused's Fifth Amendment rights. Oregon v. Hass, 420 U.S. 714, 722 (1975).

The Sixth Amendment right of Petitioner to the assistance of counsel was violated when he was not given an opportunity to consult with his court-appointed counsel about his participation in, and the legal ramifications of, the psychiatric examination prior to its occurrence.

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Petitoiner did not at any time waive his constitutional right to the effective assistance of counsel as such a waiver "must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends. . . 'upon the particular facts and circumstances surrounding [each] case . . .'" Edwards v. Arizona, 451 U.S. 477, 482, 101 S.Ct. 1880, 68 L. Ed.2d 378 (1981), quoting Johnson v. Zerbst, 304 U.S. 458, 464, 82 L.Ed.2d 1461, 58 S.Ct. 1019 (1938).

The pretrial psychiatric examination procedure utilized in this case violated Petitioner's Sixth Amendment right to effective assistance of counsel, which "right attached when the psychiatrist examined the defendant and the interview proved to be a 'critical stage' of the proceedings. Id., at 470, 101 S.Ct. at 1877." Spivey v. Zant, 661 F.2d at 475.

> Justice Stewart, joined by Justice Powell, agreed that since the examination took place without notice to defendant's counsel, the sixth amendment prohibited the introduction of the psychiatrist's testimony; he would not have reached the fifth amendment issue. Id., at 1879, (Stewart, J., concurring in the judgment). Similarly, Justice Rehnquist agreed that the defendant's attorneys were entitled to be made aware of the psychiatrist's activities involving their client and to advise and prepare the client accordingly; he too would not have reached the fifth amendment issue. Id., (Rehnquist, J.,concurring in the judgment).
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>
> if Spivey was required to submit to the examination without previous notice to counsel, either because he had no attorney, as his petition alleges, or because he was represented but his attorney received no notice of the April 15 order, then this case is within Smith and Spivey's sixth amendment attack succeeds. As in Smith, the psychiatric examination here was conducted after adversary proceedings ahd been instituted, as Spivey had been indicted. Spivey's sixth amendment right to counsel had attached when Dr. Smith examined him and their interview proved to be a critical stage of the proceedings against petitioner. Id., at 475, 476.

The prosecution utilization at trial of the statements purportedly made by the Petitioner to Sanity Commission member Marceau likewise violated the defendant's Sixth Amendment right to the assistance of counsel as Petitioner's court-appointed counsel failed to assist him in deciding whether to submit to the examination, Petitioner was not advised by his counsel as to how the findings of the psychiatrist could be utilized, and defense counsel was not notified of the time and place of the examinations of the Petitioner by the Sanity Commission members.

The Louisiana Supreme Court itself states that the evidence introduced on Felde's behalf was "very persuasive". Certainly it cannot be argued that, aside from the improper

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utilization of the alleged Sanity Commission "statement" -- which wasnever admitted into evidence -- that guilt was otherwise clear beyond a reasonable doubt. To the contrary, but for the unconstitutional utilization thereof, the jury would in all likelihood have returned the insanity verdict sought by the accused.

In Felde, the Louisiana Supreme Court, in holding that constitutional deprivations which occurred to be erroneous but "harmless", failed to make any declaration of a belief on its part that the constitutional error was harmless "beyond a reasonable doubt". See, Chapman v. California, 386 U.S. 18 (1967); State v. Felde, supra, at 383.

In a death penalty case, procedural rules that diminish the reliability of a jury's determination of guilt or sentence are invalid. Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

Utilization of the Marceau Sanity Commission report amounted to a violation of federal constitutional rights and the Louisiana Surpeme Court was therefore obliged to apply the federal harmless error test established in Chapman, to wit, declare its belief that the constitutional error complained of was harmless beyond a reasonable doubt -- which test was not applied. Id., at 24, 87 S.Ct. at 828.

This is not the usual type of harmless error case where guilt is otherwise clear beyond a reasonable doubt. The State's evidence was weak and contradicted on numerous points except the most telling throughout this prosecution -- the victim was a uniformed policeman.

SUMMARY OF ARGUMENT

Petitioner submits that a writ should be allowed in this case as the totality of circumstances which surrounded the examination of Petitioner by Dr. Marceau, and the method of utilization of the material by the State Prosecutor at Petitioner's trial to establish guilt and undermine the insanity defense, was violative of Petitioner's constitutional rights and was not harmless error.

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No. A-682

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WAYNE ROBERT FELDE,

PETITIONER,

V.

LOUISIANA,

RESPONDENT.

ON WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

NATHANIEL GRAVES THOMAS
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SHREVEPORT, LOUISIANA 71101
318-221-2241
[MARCH 17, 1983]

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M. GRAVES THOMAS
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STATE of Louisiana

v.

Wayne Robert FELDE.

No. 81-KA-0998.

Supreme Court of Louisiana.

Oct. 18, 1982.

Rehearing Denied Dec. 17, 1982.

Defendant was convicted in the Ninth Judicial District Court, Parish of Rapides, Guy E. Humphries, Jr., J., of first-degree murder, and he appealed. The Supreme Court, Watson, J., held that: (1) evidence sustained finding that defendant was sane at the time of the offense; (2) evidence sustained finding that defendant had the requisite intent; (3) errors in prosecutor's closing argument were harmless; (4) hearsay evidence was properly excluded; (5) defendant was not denied effective assistance of counsel when counsel agreed to defendant's request not to seek any verdict other than not guilty by reason of insanity or guilty with the death penalty; (6) fact that victim was a police officer performing his regular duties was of sufficient aggravating circumstance to warrant imposition of death penalty; and (7) death penalty was properly imposed.

Affirmed.

Dennis, J., filed a concurring opinion.

1. Criminal Law ⇐633(1)

In a death penalty case, procedural rules which diminish the reliability of a jury's determination of guilt or sentence are invalid.

2. Criminal Law ⇐641.12(1)

Evidence did not establish that setting of trial date for another murder case in which defense counsel was involved four weeks prior to defendant's trial and rescheduling of that trial to a date less than a month after defendant's trial began was intended to, or had the effect of, hindering defendant's counsel.

3. Criminal Law ⇐633(1)

There was no inherent prejudice in trial procedure under which trial was held on 11 consecutive days, beginning at 9:00 a.m. on most days and continuing to 7:30 p.m. or even later on most days. LSA-C.Cr.P. art. 17.

4. Criminal Law ⇐633(1)

Evidence did not establish that guilty verdict or sentence of death was influenced by trial schedule which had court in session on 11 consecutive days, beginning at 9:00 a.m. on most days and continuing past 7:00 p.m. on most days.

5. Witnesses ⇐269(4)

Where defense witness testified on direct examination about her knowledge of homicide, State was entitled to cross-examine her as to the details of the event, including statements made by defendant thereafter.

6. Witnesses ⇐206(1)

Doctor-patient privilege is not applied to a physician who is court appointed. LSA-R.S. 15:476.

7. Witnesses ⇐219(3)

Doctor-patient privilege concerning statements made by defendant to psychiatrist was waived when defendant pleaded guilty.

8. Witnesses ⇐297(4)

When defendant fails to plead not guilty by reason of insanity, information furnished to the sanity commission cannot be used in his cross-examination; involuntary, uncounselled disclosures at a pretrial sanity examination cannot be used at trial without violation of the Fifth Amendment privilege against self-incrimination. U.S. C.A. Const.Amend. 5.

9. Criminal Law ⇐412.1(2)

Where defendant testified that members of the sanity commission amounted to policemen as far as he was concerned and that he did not trust them when he went in to talk to them and was not cooperative, statements made to the sanity commission were free and voluntary.

10. Witnesses ⇐390

Miranda does not preclude cross-examination on basis of voluntary, uncoerced, prior statements which are inconsistent.

11. Criminal Law ⇐1170½(1)

Where member of sanity commission was not allowed to testify on direct examination about the substance of what defendant told him and where there was never any affirmative evidence that statements which defendant was asked about were actually made by him to the member of the commission, any error in cross-examining defendant about the statements was relatively harmless. LSA-C.Cr.P. art. 921.

12. Criminal Law ⇐1171.3

In view of the ample independent evidence that defendant was sane at the time of the offense, prosecutor's improper rebuttal argument concerning statements made by defendant to sanity commission member which were based on matters not of record was harmless.

13. Criminal Law ⇐627.6(1), 627.7(3)

Statements and addresses of potential witnesses were subject to discovery by the defense only if they were favorable to the defendant and material and relevant to the issue of guilt or punishment. LSA-C.Cr.P. arts. 718, 723.

14. Criminal Law ⇐627.6(6)

Absent some showing that the State was suppressing exculpatory material, trial court did not err in refusing to give defendant the prosecution's files on certain witnesses.

15. Criminal Law ⇐627.6(3)

Where State offered to let the court conduct an inspection of all the photographic negatives in its records, so that defendant could have determined if there were any photographs which were helpful to the defendant, court did not err in denying motion commanding production of photographs favorable to the defendant.

16. Criminal Law ⇐438(1)

Photographs which would allegedly have shown that the police intended to shoot the defendant in cold blood after he committed the offense were irrelevant to the issue of the circumstances under which the defendant shot the victim.

17. Criminal Law ⇐1170½(1)

Leading questions are not the type of prosecutorial error which diminishes the reliability of the jury's verdict and only where there is a clear abuse of discretion which prejudices defendant's rights will a conviction be reversed because of leading questions.

18. Criminal Law ⇐1170½(5)

Where similar information was brought out by the defense during defendant's direct testimony, cross-examination of defendant's sister as to whether her father was on probation from a federal offense when he died and as to the nature of her father's drinking problem and propensity to violence was not error.

19. Criminal Law ⇐438(1)

Where employee testified that defendant's sister cashed a $50 check when defendant bought a gun, the driver's license of defendant's sister and her photograph on it were relevant to the circumstances in which defendant purchased the murder weapon and they were properly admitted into evidence despite argument that the State's only purpose was to utilize the personal unattractiveness of the defendant's sister against the defendant.

20. Criminal Law ⇐419(12)

Letter in which defendant's brother described defendant's changes in personality after his return from combat in Vietnam was properly excluded as hearsay. LSA-R.S. 15:434.

21. Criminal Law ⇐419(1)
Homicide ⇐179

In defendant's trial for homicide in which he asserted a defense of insanity based on posttraumatic stress disorder, results of a questionnaire intended to identify Vietnam veterans who had suffered from exposure to Agent Orange was properly excluded as hearsay and as irrelevant to the question of whether defendant was insane at the time of the crime.

22. Homicide ⇐179

In defendant's trial for murder in which he asserted a defense of insanity based on posttraumatic stress disorder as a result of his combat experiences in Vietnam, trial court properly excluded, as irrelevant, testimony of defendant's sister about the effects of World War II on defendant's father. LSA-R.S. 15:275.

23. Criminal Law ⇐478(1)

Person who had researched complaints from Vietnam veterans did not qualify as an expert on the effect of Agent Orange.

24. Criminal Law ⇐354

Proffered testimony of person, who had researched complaints from Vietnam veterans, about his own ability to cope with Vietnam combat was irrelevant to defense of insanity based on claim of posttraumatic stress disorder as a result of combat experiences in Vietnam.

25. Homicide ⇐179

In defendant's trial for murder in which he asserted defense of insanity based on posttraumatic stress disorder as a result of his combat experiences in Vietnam, proffered testimony of operating room nurse in Vietnam regarding the type of combat wounds received by Vietnam veterans and her personal feelings about the war was irrelevant.

26. Criminal Law ⇐1134(3)

Where ordered medical examination of defendant never took place, trial court's error in ordering a midtrial mental examination was moot where there was no evidence that the threat of the examination affected defendant or his counsel or that the jury had knowledge of the proposed examination.

27. Criminal Law ⇐655(5), 656(1)

Comments made by trial court during the course of the trial, including imploring counsel to get back to the subject of the case, acknowledging that one witness was correct in her testimony that she was "lost," in admonishing one witness not to sit in the chair for an hour and a half over the lunch break, and in commenting that a witness was creating a problem with his commentary and editorializing on every question did not convey to the jury any impression as to the accused's guilt or innocence. LSA-C.Cr.P. art. 772.

28. Criminal Law ⇐713

In defendant's trial for murder in which he asserted defense of insanity based on posttraumatic stress disorder as a result of his combat experience in Vietnam, prosecutor's closing arguments that photographs of the scene of the offense looked like a Louisiana highway on which the defendant was being escorted to jail rather than looking like a foxhole or a cave or anything in Vietnam was proper.

29. Criminal Law ⇐1171.1(3)

Because of evidence that defendant was an escapee at the time of the offense and intended to avoid further jail time, where was a factual basis for prosecutor's closing argument that the defendant, if found not guilty by reasons of insanity, would easily escape and, although that prediction of the consequences of the jury's verdict was improper, the error was not likely to have contributed to the verdict. LSA-C.Cr.P. art. 774.

30. Criminal Law ⇐1171.1(5)

Prosecutor's brief reference in closing argument to the fact that the automobile seat in which police officer was sitting at the time that he was shot had not been brought into evidence but was in the courthouse and had been available if the defense wanted to present it was harmless.

31. Criminal Law ⇐719(1)

Prosecutor erred in quoting from report of psychiatrist in his final argument to the jury where the report was not in evidence. LSA-C.Cr.P. art. 774.

32. Criminal Law ⇐1171.1(3)

Prosecutor's error in quoting in closing argument from report of psychiatrist which had not been admitted into evidence was not so prejudicial as to require a new trial where the jury was charged that the prosecutor's arguments did not constitute evidence.

33. Criminal Law ⇐649(1)

Trial court did not err in ordering recess between defense closing argument and prosecutor's rebuttal, even though court had failed to declare a recess following the closing argument of the prosecution and before the closing argument of the defendant.

34. Criminal Law ⇐726

Where defense counsel alluded to material in psychiatrist's report in closing argument, rebuttal which referred to information in psychiatrist's report did not exceed the scope of defendant's closing argument.

35. Criminal Law ⇐726

Where defendant had referred to the manslaughter statute in his closing argument, rebuttal argument on the law of manslaughter was proper, even though defendant was only seeking a verdict of not guilty by reason of insanity or guilty with the death penalty.

36. Criminal Law ⇐645

State has the right to make the last argument to the jury. LSA-C.Cr.P. art. 765.

37. Criminal Law ⇐331

Defendant's burden of proof on the affirmative defense of insanity is constitutional.

38. Criminal Law ⇐868

Evidence did not show that jury was not properly insulated from outside influences because the jury room was the most convenient and, at times, the only place where hot coffee could be found.

39. Jury ⇐90

Disclosure during trial that a juror is acquainted with a witness does not necessarily prevent a fair trial.

40. Jury ⇐90

Defendant was not deprived of a fair trial by fact that one juror apparently knew one of the State's witnesses who testified in rebuttal as a member of the sanity commission.

41. Criminal Law ⇐570(1)

Testimony by members of the sanity commission was sufficient to sustain jury's finding that defendant was sane at the time of the offense despite persuasive testimony about the effect of Vietnam combat on defendant and testimony about posttraumatic stress syndrome.

42. Homicide ⇐230

Evidence that defendant deliberately killed police officer in order to escape and that he was not totally intoxicated as he was able to get out of the police car, cross the median, and travel some additional distance and reload his gun while handcuffed was sufficient to show a specific intent to kill or inflict great bodily harm on the officer.

43. Criminal Law ⇐641.13(4)

To establish ineffective representation, it must be shown that counsel did not meet the level of competency normally demanded in criminal cases; adequate defense must be based on informed professional deliberation.

44. Criminal Law ⇐641.13(2)

Defendant was not deprived of effective assistance of counsel merely because counsel agreed to follow defendant's instruction to not attempt to obtain any verdict other than not guilty by reason of insanity or guilty of first-degree murder with capital punishment. LSA-Const. Art. 1, § 13; U.S.C.A. Const.Amend. 5.

45. Criminal Law ⇐641.13(1)

Fact that a particular strategy is unsuccessful does not establish ineffective assistance of counsel.

46. Attorney and Client ⇐88

Defendant, who was mentally competent to stand trial and enrolled as cocounsel, had a constitutional right to impose condition of employment on his counsel.

47. Attorney and Client ⇐88

Defendant can limit his defense consistent with his wishes at the penalty phase of trial.

48. Criminal Law ⇐999(1)

Defendant can waive postconviction remedies.

49. Criminal Law ⇐1026

Defendant cannot waive his right to appeal a death sentence.

50. Criminal Law ⇐641.13(2)

Defense counsel's agreement, in accordance with defendant's wishes, not to ask the jury for life imprisonment even after jury rejected plea of not guilty by reason of insanity did not invalidate defendant's conviction or sentence.

51. Criminal Law ⇐641.13(2)

Record demonstrated that defendant was not denied effective assistance of counsel despite claim that counsel faced to voice timely contemporaneous objections, to request appropriate jury admonitions, and to move for mistrials.

52. Criminal Law ⇐938(1)

Where expert and lay testimony on posttraumatic stress disorder was comprehensive, testimony from additional witness who were not located until after trial would merely have been cumulative and the location of those witnesses did not constitute newly discovered evidence warranting a new trial. LSA-C.Cr.P. art. 854.

53. Witnesses ⇐13

Where subpoena was served on prosecutor at a late date and the prosecutor was unable to appear, trial court was within its discretion in quashing the subpoena directing the prosecutor to appear for the hearing on motion for new trial on the ground that the subpoena was oppressive.

54. Criminal Law ⇐913(1)

Fact that, after conclusion of defendant's trial in which plea of not guilty by reason of insanity based on posttraumatic stress disorder was asserted as a defense, Louisiana hospitals adopted manual of the American Psychiatric Association recognizing the disorder did not require grant of a new trial.

55. Criminal Law ⇐1134(3)

Contention that trial court erred in failing to grant defense motion for payment of trial expenses was irrelevant to defendant's appeal.

56. Criminal Law ⇐906(3)

Errors in uniform capital sentencing report which indicated that defendant had only completed 11th grade, rather than graduating from high school, and had received a 15-year sentence for second-degree murder in prior case in which he had actually pled guilty to manslaughter and received a sentence of 12 years were inadvertent and did not show that trial court had a negative attitude towards defendant which affected sentencing.

57. Criminal Law ⇐906.5

Fact that defendant did not receive a copy of capital sentencing report was a technical omission which did not harm him. LSA-C.Cr.P. art. 905.9.1, § 3.

58. Homicide ⇐354

Sentence of death imposed upon defendant who sought death penalty after plea of not guilty by reason of insanity was rejected and who had been convicted of killing a police officer in the line of duty was not imposed under the influence of passion, prejudice, or any other arbitrary factor. LSA-C.Cr.P. art. 905.9.1.

59. Homicide ⇐354

Fact that the victim was a peace officer performing his regular duties was an adequate aggravating circumstance to warrant imposition of death penalty. LSA-C. Cr.P. art. 905.4(b).

60. Homicide ⇐354

Where only one other death penalty had been imposed in the parish since January 1, 1976 and there had been no other verdicts of first-degree murder, as all other homicides involving a charge of first-degree murder had been plea bargained to a charge of second-degree murder or lesser offense, and where none of the other murders involved the situation where a police officer was killed in the line of duty, imposition of death penalty on defendant who was con-

victed of first-degree murder of a police officer in the line of duty could not be held disproportionate to the sentences in other cases. LSA-C.Cr.P. art. 905.9.1.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Paul J. Carmouche, Dist. Atty., R. Cody Mayo, Edward E. Roberts, Jr., Dale G. Cox, Asst. Dist. Attys., for plaintiff-appellee.

Nathaniel Graves Thomas, Shreveport, for defendant-appellant.

WATSON, Justice.

Defendant, Wayne Robert Felde was convicted of first degree murder. LSA-R.S. 14:30.[1] The jury unanimously recommended a death sentence on the ground of one aggravating circumstance: the victim was a peace officer engaged in his lawful duties. LSA-C.Cr.P. art. 905.4(b).[2] Defendant has appealed and assigns fifty errors by the trial court.

FACTS

Felde, convicted of manslaughter and assault in Maryland, was serving a twelve year sentence when he escaped from a minimum security job and hitchhiked to his mother's home in Grand Cane, Louisiana. Felde then visited other states but returned to Louisiana because of his mother's terminal cancer. He was accompanied by two Colorado friends, Larry Hall and Cheryl McKenzie. At his mother's dying request, Felde abandoned an alias, Harold "Harry" Hershey, and worked under his real name in Shreveport, Louisiana. His mother died on October 13, 1978.

On October 20, 1978, Felde's sister, Florence McDonald, told him the police were looking for him. She drove Felde, Hall and McKenzie to Lorant's Sporting Goods in Shreveport where Felde purchased a .357 Magnum gun and a box of shells. With the loaded gun in his waistband, Felde was dropped off at the Pizza Inn on Highway 171. Larry Hall and Cheryl McKenzie were supposed to get his things and pick him up at the parking lot behind the pizza place. Felde stayed awhile at the Pizza Inn and then went next door to the Dragon Lounge. He waited in vain about six hours and drank enough beer to get "pretty loaded". (Tr. 2118) He finally asked that a taxi be called. Because a customer reported there was someone at the Lounge with a gun, two officers arrived in separate vehicles. While they were frisking another customer, Felde was following the taxi driver outside. After being told Felde was the man with the gun, officers Norwood and Thompkins searched him but did not discover the pistol.

The taxi driver refused to carry Felde because of his intoxication, and officer Thompkins arrested him as a simple drunk. Felde's hands were handcuffed behind his back and he was placed in the rear seat of Thompkins' police car. While Felde was being driven in the police car, William David Sweet, in another car, observed Felde up close behind the front seat. Felde was leaning forward on the right hand side of the driver. The officer put on his brakes and simultaneously made a motion to push Felde back in the seat. Felde said he was trying to shoot himself when he was pulled forward and pushed back. A shot was fired. There was testimony that the car filled with smoke. Felde did not remember anything after the first explosion. There were three other shots, leaving Felde with at least one bullet in his gun. The vehicle swerved against a guard rail and stopped. Thompkins staggered out of the car across the road before collapsing dead in a ditch.

1. LSA-R.S. 14:30 provided at the time of the crime, October 20, 1978:

"First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm.

"Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury."

2. LSA-C.Cr.P. art. 905.4(b) provides:

"The following shall be considered aggravating circumstances:

* * * * * *

"(b) The victim was a fireman or peace officer engaged in his lawful duties; . . ."

Felde ran slowly away, pausing before he crossed the street, and disappeared in an automobile lot. Shortly afterward, the police discovered Felde in a nearby residential area up against a fence. Officer Humphrey told Felde to freeze. Felde crouched on the ground, brought his hands up and held a gun in a shooting position. Officer McGraw told him to drop it and then fired a shotgun at Felde twice: twelve buckshot pellets were fired in each blast.[3] Felde, still handcuffed but with his hands in front of him, curled up on the ground in a fetal position.[4] His .357 Magnum gun was in a cocked position and fully loaded.

Dr. Robert E. Braswell, the Caddo Parish coroner, conducted the autopsy on Officer Thompkins, who died of a gunshot wound in the right lower back which entered at a downward angle of forty-five degrees. The bullet fragment hit the twelfth rib, grazed the right kidney, and then hit the vena cava and the aorta, before lodging in the abdominal wall. Another bullet which entered on the right side at approximately the same angle would not necessarily have been fatal. At least one bullet went through the roof of the car.

Felde was treated for gunshot wounds to the chest, abdomen, and lower extremities; abdominal abscess; fracture of the left tibia; fracture and gunshot wound in the right ankle; perforations of the stomach, small bowel, right colon, Sigmoid colon, right kidney, right lobe of the liver, spleen, and pancreas; and acute renal failure. Surgery was performed, including: an exploratory laparotomy; a splenectomy; removal of part of the liver; a right colectomy; right nephrectomy; suture of perforations of the stomach and small bowel; drainage of the pancreas; a left Sigmoid colostomy; and a shunt in the left ankle.

Because Felde pleaded not guilty and not guilty by reason of insanity, the court, on motion of the state, appointed Dr. Braswell and two psychiatrists, Dr. R. Fred Marceau and Dr. Norman Mauroner, to a sanity commission. LSA–C.Cr.P. art. 650.[5] All agreed that Felde was competent to stand trial and sane at the time of the offense, able to tell right from wrong. At trial, Felde was enrolled as co-counsel. The defense was insanity at the time of the crime; defendant allegedly suffered a post-traumatic stress syndrome as the result of combat in Vietnam.

Dr. Fred Marceau, a former member of the faculty at the L.S.U. Medical School in the field of psychiatry, saw Felde on January 31, 1979. Felde cooperated with Marceau during the hour and fifteen minute sanity commission interview. Dr. Marceau estimated that Felde was in the moderate range of intoxication at the time of the shooting. Dr. Marceau testified that there is a condition known as chronic or delayed post-traumatic stress disorder which can start six months from the traumatic event. Military combat can cause this condition and, in some instances, it results in disassociative states during which the individual behaves as though reexperiencing the traumatic event. Nothing in Dr. Marceau's examination of Felde would support a claim of post-traumatic stress disorder.

There was lay testimony that there was a noticeable difference in Felde's behavior before and after his military duty in Vietnam. Before his service, he was a jovial, happy-

3. This account was contradicted by a witness, Keenan Gingles, who indicated that at least one other officer also fired a shotgun.

4. The defense argues that Felde's hands remained handcuffed behind him throughout the encounter and this is proven by the pattern of his injuries sketched at Confederate Memorial Medical Center. The diagrams are not conclusive. If Felde's hand and arms were held in front of his head, also uninjured, they would not have been hit.

5. LSA–C.Cr.P. art. 650 provides:

> "When a defendant enters a combined plea of 'not guilty and not guilty by reason of insanity,' the court may appoint a sanity commission as provided in Article 644 to make an examination as to the defendant's mental condition at the time of the offense. The court may also order the commission to make an examination as to the defendant's present mental capacity to proceed. Mental examinations and reports under this article shall be conducted and filed in conformity with Articles 644 and 648."

go-lucky kid. Afterward, he was moody, depressed, and irritable, with erratic sleeping habits and a low tolerance for alcohol. One of Wayne Felde's sisters, Maria Kristine Krebsbach, testified that she had sent one brother to Vietnam and a different one, a stranger, had returned. This sister, a nurse, and her mother, also a nurse, attempted to get psychiatric help for Felde but were unable to do so.

The transcript of testimony of Dr. Guillermo Olivos was read into the record. A board certified psychiatrist, Dr. Olivos saw Wayne Felde on December 8, 1973, after the Maryland homicide. Concerning the killing of his friend, Felde had a poor memory and questioned whether he did it, how he did it, and whether he did it in self-defense. He was ambivalent and depressed about the situation.

Dr. John P. Wilson testified for the defense as an expert psychologist and professor of psychology who has made special studies of the post-traumatic stress disorder in Vietnam veterans. Dr. Wilson examined Felde on August 30, 1979, at the Caddo Parish Jail for four and a half hours. Dr. Wilson concluded unequivocally that Wayne Felde had a chronic form of post-traumatic stress disorder. This is a recognized behavioral disorder or mental defect which is recognized by the American Psychiatric Association. The symptoms are also shared by survivors of atomic attacks, holocausts or natural disasters. Post-traumatic stress response symptoms include: depression; flashbacks to the trauma; inability to control one's impulses; violent, explosive behavior; frequent suicidal thoughts and recurring nightmares. There is often memory impairment and inability to feel close to people, an emotional numbing. There is a great deal of survivor guilt with this disorder. Because of the type of combat required in Vietnam, veterans of that conflict also have moral guilt. The disorder is not new but was only recently recognized by the American Psychiatric Association as a bonafide mental disorder. Sixty percent of Vietnam combat veterans experience post-traumatic stress, a very high percentage. This is because units did not stay together, there was no real war objective, the soldiers were quite young, and drugs were freely available at a low price. Vietnam soldiers averaged 19.2 years, whereas those in World War II and Korea averaged 26½. The units in World War II stayed intact and came home together whereas in Vietnam each veteran came home alone. Vietnam veterans with P.T.S.D., or post-traumatic stress disorder, tend to move from one job to another. Felde's military record showed three AWOLs and a drunk charge, the first AWOL occurring one month after he returned from Vietnam. On one of these occasions, Felde wrecked a brand new car; his behavior was erratic and irrational. These episodes were consistent with his post-traumatic stress syndrome as were his marital difficulties. Part of the syndrome is a hyper alertness, where the person becomes easily irritated and agitated and startles easily. Sleep disturbances are part of the disorder. Twenty-five percent of all men in prison are Vietnam era veterans. The suicide rate of Vietnam veterans is thirty-three to forty percent higher than that of others the same age. The alcoholism rate among Vietnam veterans is sixty percent higher than it was for veterans of World War II or Korea. The Veterans' Administration now recognizes post-traumatic stress disorder as a service connected disability for which treatment can be received. Stress in a person's emotional life, such as the death of a mother, can trigger disassociative reactions. Dr. Wilson said that Felde's Maryland killing sounded like a classic disassociative reaction in which a person uses survival contact tactics because he is not fully aware of what is happening. Many Vietnam veterans suffering from post-traumatic stress disorder are being misdiagnosed as being alcoholics or having other disorders. Felde's prison record in Maryland was exemplary, which is characteristic of Vietnam veterans. The confined, controlled environment helps the post-traumatic stress disorder. Although they suffer tremendously, such inmates tend to behave well while incarcerated. Dr. Wilson testified that, since his father died when Wayne

Felde was twelve, he was particularly close to his mother, the most significant support person in his life. After losing his mother and then learning that the police were coming for him, he felt helpless, trapped and scared. He bought the gun as a form of security against an impending threat. Many Vietnam veterans even sleep with their weapons. In the doctor's opinion, Felde bought the gun as part of a decision to kill himself. When Felde pulled the gun in the car, it was Dr. Wilson's opinion that he wanted to kill himself rather than Officer Thompkins. Dr. Wilson recounted Felde's account of the situation beginning at the Dragon Lounge, "they asked me where, where I had the, where the gun was, then they handcuffed me and put me in the police car. I was in the back of the car and I thought I'd blow my brains out. I tried to turn the barrel around towards my face. I remember the jerk going forward then I saw flashes, flashes like incoming round hits, like firecrackers, hearing machine guns, I heard machine guns, I heard rifle fire, I heard more explosions and I couldn't move. I was happy because I knew I was going to die." (Tr. 1804–1805) According to Dr. Wilson, this fragmented memory is totally consistent with a disassociated state and flashback typical of post-traumatic stress disorder. In Dr. Wilson's opinion, "At that time, in that disassociated state, he couldn't discriminate right from wrong and he couldn't conform his conduct to the law. I think he was totally disoriented." (Tr. 1806) Dr. Wilson said that Felde needed long term group psychotherapy with other veterans and, if he were put on the street, he would either kill himself or kill someone else. Dr. Wilson also said that the M.M.P.I. tests (Minnesota Multiphasic Personality Inventory) on Felde were entirely consistent with P.T.S.D. His M.M.P.I. shows a depressed, scared, introverted, passive person. Dr. Wilson admitted that Felde's reloading of the gun was inconsistent with his desire to kill himself. He also admitted it was possible Felde shot Thompkins simply because he didn't want a return to prison.

Dr. Charles Figley, a tenured professor in psychology, author of articles and books, and a nationally recognized expert on the adjustment problems of Vietnam veterans, testified as an expert psychologist that Felde is definitely suffering from a mental defect, a post-traumatic stress disorder. Felde was in the upper twenty percent of veterans in his exposure to combat stress. In this doctor's opinion, Felde bought the gun to kill himself and was trying to commit suicide in the police car.

Dr. Joe Ben Hayes, an expert in psychiatry, testified that, in his opinion, Felde is suicidal and has a post-traumatic stress disorder. In this doctor's opinion Felde bought the gun to kill himself if he were cornered.

Dr. Norman Mauroner, a member of the Sanity Commission, and a specialist in psychiatry testified in rebuttal. In Mauroner's opinion, on October 20, 1978, at approximately 9:30 P.M., Felde was able to distinguish right from wrong. Dr. Joe Ben Hayes then testified again in surrebuttal that Felde did not give him any real information about his disorder until his fourth evaluation.

ASSIGNMENT OF ERROR NUMBER ONE

"The prosecution engaged in improper pretrial maneuvering and overreaching for the purpose of interfering with trial preparation of defense counsel and thereby caused the defendant to be deprived of his rights to compulsory process and effective assistance of counsel."

It is contended that the state fixed trial in *State v. Mills*, a second degree murder case with the same defense counsel, less than four weeks prior to Felde's trial to prevent Felde's counsel from proper preparation. Further, it is argued that the *Mills'* trial was continued until September 8, 1980, less than a month after Felde's trial began, to hamper defense counsel's concentration. Despite these alleged manuevers, counsel argues that he could not request a continuance because of Felde's mental deterioration in prison.

[1] Defense counsel did not object to the setting of the *Mills'* case for trial and raises the issue for the first time on appeal. LSA–C.Cr.P. art. 841.[6] Despite the lack of a contemporaneous objection, the assignment has merit if it was a factor in the jury's decision. In a death penalty case, procedural rules that diminish the reliability of a jury's determination of guilt or sentence are invalid. *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). See *State v. Sonnier*, 379 So.2d 1336 (La., 1980).

[2] Defense counsel was engaged to represent Felde on July 13, 1979, and trial began on August 11, 1980, giving him a year to prepare the case. It has not been established that the prosecution tried to hinder Felde's counsel. The latter conducted a vigorous defense. The record does not indicate any lack of preparation or establish that the defense was prejudiced. When there is inadequate time, the proper remedy is a continuance, which was not requested. LSA–C.Cr.P. art. 712.[7]

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

"The unreasonable and unjustifiable voir dire and trial schedule fixed by the trial court deprived the accused of his right to due process of law, his right to effective assistance of counsel during voir dire and at trial, his right to full voir dire examination of prospective jurors, his right to trial by a fair and impartial jury, and his right to testify at trial in his own behalf."

It is argued that the trial judge accelerated the trial schedule in order to complete the matter before the Labor Day weekend and thereby subjected defense counsel and defendant, as well as the jury, to undue fatigue. Also, the schedule created defense problems in examination of out of town experts. It is contended that the trial schedule was as follows:

August 11 (Monday)	— 9 a.m. to 10:15 p.m.
August 12 (Tuesday)	— 9 a.m. to 9:30 p.m.
August 13 (Wednesday)	— 9 a.m. to 9 p.m.
August 14 (Thursday)	— 9 a.m. to 8:30 p.m.
August 15 (Friday)	— 9 a.m. to 3:15 p.m.
August 16 (Saturday)	— 9 a.m. to 8 p.m.
August 17 (Sunday)	— 10 a.m. to 7 p.m.
August 18 (Monday)	— 9 a.m. to 7:30 p.m.
August 19 (Tuesday)	— 9:30 a.m. to 6 p.m.
August 20 (Wednesday)	— 9 a.m. to midnight
August 21 (Thursday)	— 12:01 a.m. to 1:15 a.m.

[First Supplemental Brief, P. 43]

It is conceded that these hours included one and one half hour lunch and dinner recesses.

[3] There was no specific objection to the trial schedule. LSA–C.Cr.P. art. 841. The trial was conducted in an expeditious manner as required by LSA–C.Cr.P. art. 17,[8] and the sequestered jury undoubtedly preferred that the trial move forward on a seven day basis. There is no inherent prejudice in such a trial procedure. *Oertle v. United States*, 370 F.2d 719 (10 Cir.1966).

6. LSA–C.Cr.P. art. 841 provides:

"An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. A bill of exceptions to rulings or orders is unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or of his objections to the action of the court, and the grounds therefor.

"The requirement of an objection shall not apply to the court's ruling on any written motion."

References to Art. 841 and failure to object will be found in subsequent assignments, not to indicate that the error cannot be considered but merely to note that the error was not a matter of concern at the time.

7. LSA–C.Cr.P. art. 712 provides:

"A motion for continuance, if timely filed, may be granted, in the discretion of the court, in any case if there is good ground therefor."

8. LSA–C.Cr.P. art. 17 provides:

"A court possesses inherently all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue such writs and orders as may be necessary or proper in aid of its jurisdiction. It has the duty to require that criminal proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done. A court has the power to punish for contempt."

[4] Defense counsel, despite the strain on his time and energy, conducted an excellent defense. The extensive evidence, lay and expert, about Felde's post-traumatic stress disorder following combat in Vietnam is very persuasive. The jury was moved to state their support for veterans in general although they rejected Felde's plea of insanity at the time of his offense.[9] There is no indication that either the guilty verdict or the sentence was influenced by the trial schedule.

This assignment lacks merit.

ASSIGNMENTS OF ERROR NUMBER THREE, SIXTEEN, SEVENTEEN, EIGHTEEN, NINETEEN, TWENTY, TWENTY-ONE, TWENTY-TWO, TWENTY-THREE, TWENTY-FOUR, TWENTY-FIVE, TWENTY-SIX, AND TWENTY-SEVEN

"The misinformation and misrepresentations set forth in the prosecution Response to Defendant's Motion for Discovery and in the prosecution Supplementary Response to Defendant's Motion for Discovery." (No. 3)

"The prosecution failure to furnish the defense with any notice of intent to utilize extraneous offense evidence at trial." (No. 16)

"The improper and prejudicial prosecution utilization of extraneous offense evidence at trial." (No. 17)

"The prosecution failure to furnish the defense with any notice of intent to utilize at trial alleged inculpatory statements purportedly made by the accused." (No. 18)

"The improper and prejudicial prosecution utilization at trial of alleged inculpatory statements purportedly made by the accused which were not legally admissible as evidence." (No. 19)

"The prosecutor, in asserting facts by way of questions propounded to witnesses in the presence of the jury, made himself a witness without being subject to cross-examination, in violation of the fundamental principle of the hearsay rule and of the constitutional right to confrontation." (No. 20)

"The prosecutor, through improper displays and by making factual statements in the form of questions propounded to witnesses in the presence of the jury, improperly utilized an inculpatory statement allegedly obtained from the defendant by police in connection with the defendant's 1972 Maryland homicide charge, neither the existence nor the free and voluntary character of which statement was ever established by any evidence whatsoever, either before or after its misuse by the prosecutor, who was well-aware that the defendant's Maryland conviction had been reversed because of the use at trial of that same statement, the character of which the Maryland Court of Criminal Appeals held had not been shown to be free and voluntary." (No. 21)

"The denial by the trial court of the Defense Motion to Expunge Portion of Sanity Commission Report." (No. 22)

"The sanity commission appointed by the Court on motion of the prosecutor, in addition to the authorized disclosure of objective psychiatric findings, improperly disclosed to the prosecutor inculpatory statements allegedly made by the defendant, which information was improperly

9. "STATEMENT ON BEHALF OF JURY
"BY MR. OLIVER: We, the Jury, recognize the contribution of our Viet Nam veterans and those who lost their lives in Viet Nam.'
"We feel that the trial of Wayne Felde has brought to the forefront those extreme stress disorders prevalent among thousands of our veterans.
"We have attempted, through great emotional and mental strain, to serve and preserve the judicial branch of our government by serving on this Jury.
"This trial will forever remain indelibly imprinted upon our minds, hearts, and consciences.
"Through long and careful deliberation, through exposure to all evidence, we felt that Mr. Felde was aware of right and wrong when Mr. Thompkins' life was taken. However, we pledge ourselves to contribute whatever we can to best meet the needs of our veterans." (Tr. 2408)

utilized at trial through the use of assertive questions propounded to witnesses by the prosecutor in the presence of the jury." (No. 23)

"The prosecutor, in order to subvert the insanity defense, asserted in questions propounded in the presence of the trial jurors, facts which he was prohibited from proving, thereby improperly commenting, by way of question, on inadmissible evidence, to wit, inculpatory excerpts from statements made to the sanity commission in 1979, and to Maryland police in 1972." (No. 24)

"Prosecution display and utilization at trial of inculpatory statements allegedly made by the defendant to the sanity commission appointed by the court on motion of the prosecutor, which statements were neither freely or voluntarily made as they were legally compelled and also because, at the time they were allegedly obtained from the defendant, he was under such extreme conditions of custodial mistreatment and stress that any such statements were the direct result of, and totally attributable to, the exertion of improper influence, fear, intimidation, menace, coercion and duress upon the mind and person of the defendant." (No. 25)

"The prejudicial failure of the trial court to immediately order the trial jury removed from the courtroom when specifically requested to do so by defense counsel." (No. 26)

"A prosecution rebuttal expert witness, who was a member of the sanity commission appointed by the court on motion of the prosecution to examine the accused, intentionally answered a defense question on cross-examination in an unresponsive manner for the sole purpose of prejudicing the defendant through disclosure to the jury of legally inadmissible and erroneous information allegedly obtained from the defendant, by the prosecution expert witness during his court-ordered psychiatric examination of defendant, which information had been disclosed to, and discussed with, the prosecutor by the witness prior to his being called to testify for the prosecution on rebuttal." (No. 27)

The prosecution represented, in answers to discovery, that it had no statements by the defendant and that it did not intend to introduce in evidence any oral statements made by defendant. It did not do so. However, statements made by Felde to Dr. Marceau and to Maryland authorities were used in cross-examination.

Mrs. Maria Krebsbach, Felde's sister, was asked by the state to read from a document the following: "We were wrestling over my rifle and I told him to leave my home and he got shot. He would not leave so he got shot." (Tr. 1554) An objection to this line of questioning was sustained. Defense counsel did not ask that the jury be admonished to disregard the testimony and no admonishment was given. The state was told to lay a foundation for introduction of the Maryland confession, S-83, before using it for cross-examination. It was never introduced into evidence.[10]

[5] Later, Ms. Krebsbach was asked if Felde said, "You don't have to worry about him, I blew his head off, he's in my bedroom closet" (Tr. 1558). She responded that she did not recall those words. All she remembered was Felde saying, "I killed a man, I think." (Tr. 1558) There was no evidence that the prior statement had been made. Mrs. Krebsbach had testified on direct examination about her knowledge of the homicide, and the state was entitled to cross-examine her on the details of the event.[11]

[6, 7] Defendant contends that the information given to Dr. Marceau during his sanity examination was privileged and

10. Felde's initial conviction in Maryland was reversed because this confession was not shown to be free and voluntary under a correct standard of proof. *Felde v. Maryland*, 336 A.2d 823, 26 Md.App. 15 (1975).

11. In direct examination, she said:

"Yes, very. Very upset. He told mother to wipe his tears and he says, 'I think there's a man in there that was shot in the head. I think I killed him.' And then, they, they took Wayne off." (Tr. 1513)

should not have been used in his cross-examination. However, the doctor-patient privilege does not apply to a physician who is court appointed. LSA-R.S. 15:476. Further, the privilege was waived when defendant pleaded insanity. *State v. Berry*, 324 So.2d 822 (La., 1975); *State v. Auvoin*, 362 So.2d 503 (La., 1978).

[8, 9] Defendant also argues that the Fifth Amendment to the United States Constitution [12] prevented cross-examination on statements purportedly made by Felde to Dr. Marceau. When a defendant fails to plead not guilty by reason of insanity, the information furnished to the sanity commission cannot be used in his cross-examination. *State v. Jones*, 359 So.2d 95 (La., 1978). Involuntary, uncounselled disclosures at a pretrial sanity examination cannot be used at trial, without violation of the Fifth Amendment privilege against compelled self-incrimination. *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). In *Estelle v. Smith, supra*, a psychiatrist who examined defendant under court order to determine his competency to stand trial testified at the penalty phase on the basis of that examination that Smith was a severe sociopath and Smith was sentenced to death. The court in *Estelle* distinguished that situation from one in which there was a sanity examination occasioned by a defendant's plea of not guilty by reason of insanity at the time of his offense. "A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Estelle v. Smith*, supra, 451 U.S. at 468, 101 S.Ct. at 1876, 68 L.Ed.2d at 372. However, Felde placed his sanity at issue. Compare *United States v. Madrid*, 673 F.2d 1114 (1982). Felde's counsel had no objection to the sanity commission's appointment. [Caddo Proceedings, Tr. 8] Thus, his attorney participated in the "significant decision" to submit to the examination. *Estelle v. Smith*, supra, 451 U.S. at 471, 101 S.Ct. at 1877, 68 L.Ed.2d at 374. Wayne Felde said that, to him, the members of the sanity commission amounted to policemen; he did not trust them when he went in to talk to them. He was guarded and polite, but said he was not cooperative. Therefore, any statements made to Dr. Marceau were free and voluntary.

[10] The statements were not introduced into evidence; they were used by the prosecution only in questioning Felde. *Miranda* [13] does not preclude cross-examination on the basis of voluntary, uncoerced, prior statements which are inconsistent. *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971).

The question of whether Felde was in a disassociated state and unable to remember what happened at the time of the crime was a key issue at trial.

[11] Felde was asked, "Do you recall telling Dr. Marceau that you vaguely remembered pointing the gun at the police officer and telling him to stop and let you out, and when your instructions were not followed, the officer started wrestling with you for the gun, the car hit a guard rail and the gun went off?" (Tr. 2150) Felde said he did not recall the statement and did not admit making other statements to Dr. Marceau. Dr. Marceau was not called in rebuttal. On direct examination, Dr. Marceau was not allowed to testify about the substance of what Felde told him. Since there was never any affirmative evidence that

12. Constitution of the United States, Amendment 5 provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

13. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

the statements were actually made, any error was relatively harmless. LSA-C.Cr.P. art. 921.[14] Compare *Esquivel v. State*, 96 Nev. 777, 617 P.2d 587 (1980) where the conviction was reversed because defendant was impeached with statements made to a psychiatrist in a court ordered mental examination.

The prosecution claimed in rebuttal argument to the jury that what defendant told Dr. Marceau was the truth:

"And either the doctor made it up or someone made it up and it does not fit in any way as an incriminating piece of evidence in this case that he pulled the gun and told the policeman to pull over, back in January of 1979, when Dr. Marceau spoke with the Defendant. It doesn't fit in any way at that time as incriminating evidence. In fact, it would have been more incriminating for somebody to tell him he pulled the gun and started executing the policeman. But, see, the truth is, obviously, the Defendant told Dr. Marceau what he recalled at the time, four months after the incident." (Tr. 2344)

The prosecutor was to some extent replying to an argument made by defense counsel, as follows:

"He's got a lot of opportunity to lie in this case, a lot. He had a lot of opportunity to lie in Maryland, and I submit that he didn't.

"My recollection of what Dr. Marceau said was that he seemed to be perfectly truthful. He didn't know exactly how much he remembered and how much was told to him.

"And why would he say the car hit a guardrail and went off at that time? That is what the paper said and that is what he was told, no doubt, by the people who were guarding him, or from the police reports." (Tr. 2295)

[12] What defendant told Dr. Marceau was not in evidence. Felde did not admit the statements. Therefore, these facts bearing on his credibility were not of record. *State v. Sayles*, 395 So.2d 695, (La., 1981). Although the prosecution's rebuttal argument was improper, defense counsel did not object. In view of the ample independent evidence that Felde was sane at the time of the offense, it is unlikely this argument carried great weight with the jury. See *State v. Moore*, 414 So.2d 340 (La., 1982); *State v. Hayes*, 364 So.2d 923 (La., 1978). Compare *State v. Carthan*, 377 So.2d 308 (La., 1979). It was only after learning that he was wanted by the police that Felde bought the pistol and shells. It was Thompkins, not Felde, who was shot and Felde reloaded his gun before he was apprehended. Even one of the expert witnesses supporting defendant's insanity defense admitted that it was possible he shot officer Thompkins to avoid going back to jail.

These assignments lack merit.

ASSIGNMENTS OF ERROR NUMBER FOUR AND FIVE

"The denial by the trial court of the Defense Motion for Court Order Commanding State Production and Disclosure of Statements and Addresses of Witnesses Favorable to the Defense; (No. 4) and

"The prosecutorial nondisclosure and suppression of exculpatory evidence of the intoxication of the accused at the time of the offense charged which exculpatory evidence was material to the question of guilt." (No. 5)

[13] As to Assignment No. 4, the state denied having any addresses for the witnesses in question more current than those in possession of defense counsel. There is no indication that there were exculpatory statements by these witnesses. Their addresses and statements were subject to discovery only if they were favorable to the defendant and material and relevant to the

14. LSA-C.Cr.P. art. 921 provides:
"A judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused."

issue of guilt or punishment. LSA–C.Cr.P. arts. 718, 723.[15]

As to Assignment No. 5, these witnesses could allegedly have testified on the question of defendant's intoxication, but there was abundant other evidence that defendant was intoxicated at the time of the crime. The prosecution denied having any information that defendant was intoxicated to the point of not knowing what he was doing, but was willing to stipulate that defendant was intoxicated.

[14] Although defense counsel argued that the prosecutor had the addresses he wanted and also exculpatory material regarding intoxication, he did not ask for an in camera examination by the trial court to settle the argument. Absent some showing that the state was suppressing exculpatory material, the trial court did not err in refusing to give defendant's counsel the prosecution's files on these witnesses.

These assignments lack merit.

ASSIGNMENTS OF ERROR NUMBER SIX, SEVEN, AND EIGHT

"The denial by the trial court of the Defense Motion for Court Order Commanding Prosecution Production of Photographs Favorable to the Defense." (No. 6)

"The granting by the trial court of the prosecution Motion to Quash Subpoena Duces Tecum." (No. 7)

"The prosecutorial nondisclosure and suppression of photographic evidence which was favorable to the accused and material to the issues of credibility and culpability." (No. 8)

Defense counsel admits that any error as to Assignment No. Seven was harmless.

[15] Defendant contends in assignments six and eight that the state had photographs of Felde which were not given to the defense, specifically shots showing Felde on the ground after being shot. It was not conclusively established that any additional photographs existed, but defense counsel argued that he had seen one in the prosecutor's office which he did not receive.[16] The state offered to let the court conduct an inspection of all the photographic negatives in its records. (Tr. 246) Thus, the defense could have had an in camera examination of the negatives to determine

15. LSA–C.Cr.P. art. 718 provides:
"Subject to the limitation of Article 723, on motion of the defendant, the court shall order the district attorney to permit or authorize the defendant to inspect, copy, examine, test scientifically, photograph, or otherwise reproduce books, papers, documents, photographs, tangible objects, buildings, places, or copies or portions thereof, which are within the possession, custody, or control of the state, and which:
"(1) are favorable to the defendant and which are material and relevant to the issue of guilt or punishment, or
"(2) are intended for use by the state as evidence at the trial, or
"(3) were obtained from or belong to the defendant.
"The court may determine whether evidence is subject to the provisions of Paragraph (1) hereof by in camera inspection."
LSA–C.Cr.P. art. 723 provides:
"Except as provided in Articles 716, 718, 721, and 722, this Chapter does not authorize the discovery or inspection of reports, memoranda or other internal state documents made by the district attorney or by agents of the state in connection with the investigation or prosecution of the case; or of statements made by witnesses or prospective witnesses, other than the defendant, to the district attorney, or to agents of the state."

16. "Many months, perhaps over a year, prior to the August 11, 1980, commencement of the *Felde* trial in Alexandria, defense counsel, perhaps even before he became defense counsel for Wayne Felde, was in the office of prosecutor Nesbitt on some other business. Prosecutor Nesbitt was on the telephone having an extended telephone conversation with someone and gave defense counsel permission to look through the police photographs in the *Felde* case which were on prosecutor Nesbitt's desk. Among the photographs were some of Wayne Felde lying on the ground shortly after being shot, at least one of which photographs was a *full* body shot, showing the entire person of Wayne Felde. Wayne Felde's arms were not over his head in the full body photograph although defense counsel cannot recall whether they were under him or handcuffed behind his back. But it was a *full* body photograph showing the entire body of Wayne Felde as he lay on his stomach after being shot." (First Supplemental Brief on Behalf of Defendant, Page 68)

if there were any photographs which had been withheld but did not avail itself of the opportunity.

[16] It is argued in connection with these assignments that the police intended to shoot Felde in cold blood. This argument is irrelevant to the real issue, the circumstances under which Felde shot officer Thompkins.

Further, the evidence does not support defendant's contention that the police attempted to execute Felde. Mr. Elzie A. Sandifer, who lives adjacent to the scene of Felde's shooting, was a defense witness who said he heard a voice say, "throw the gun down", before he heard two shots. (Tr. 1306) Mrs. Eloise Sandifer, heard a yell, "[T]hrow the gun down," before the first shot. (Tr. 1328) After the first shot, she heard "drop it". (Tr. 1330) According to her testimony, there was a warning before the first shot and an additional warning before the second shot. The uncontradicted evidence is that Felde's hands were handcuffed in front of him when he was shot. The pattern of his injuries does not prove that they must have been behind him. See Footnote 4, supra.

These assignments lack merit.

ASSIGNMENT OF ERROR NUMBER NINE

"The continuous utilization by the prosecutor of improper leading questions on direct examination of prosecution lay witnesses."

[17] When defense counsel objected to leading questions, his objections were sustained. In other instances, when defense counsel failed to object, he cannot raise the issue on appeal. LSA–C.Cr.P. art. 841. Leading questions are not the type of prosecutorial error which diminish the reliability of a jury's verdict. *Beck v. Alabama*, supra, is inapplicable. Only when there is a clear abuse of discretion which prejudices defendant's rights will a conviction be reversed because of leading questions. *State v. Swift*, 363 So.2d 499 (La., 1978); *State v. Vanderhoff*, 415 So.2d 190 (La., 1982).

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER TEN

"The improper cross-examination of the defendant by the prosecutor in the presence of the jury regarding the fact that the deceased father of the defendant had been convicted of a federal criminal offense."

[18] It is contended that asking defendant's sister, Maria Krebsbach, if her father was on probation from a federal offense when he died, together with other questions about her father's drinking problem and violence, implied that Felde was, like his father, a bad man.

Defense counsel did not object to this line of questioning. Similar information was brought out by the defense during Felde's direct testimony.

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER ELEVEN

"The improper admission into evidence by the trial court of State Exhibits 56 A and 56 b."

It is contended that the trial court should not have allowed a copy of the permanent driver's license of Felde's sister, Florence McDonald, and an enlargement of the photograph on that license into evidence. It is argued that the state's only purpose was to utilize Florence McDonald's personal unattractiveness against her defendant brother.

[19] Mr. Mustin of Lorant's testified that Florence McDonald cashed a fifty dollar check when Felde bought his gun, using a driver's license number for identification. Mustin identified the license number as the one on the check and the photograph as a depiction of the woman who cashed it. Both were relevant to the circumstances in which defendant purchased the murder weapon. The evidence was properly admitted. See *State v. Gordy*, 380 So.2d 1347 (La., 1980); *State v. Paster*, 373 So.2d 170 (La., 1979).

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER TWELVE

"The improper exclusion from evidence by the trial court of Defense Exhibit 133."

[20] It is argued that a 1975 letter written by Felde's brother-in-law, David Krebsbach, documented the changes produced in Felde from his combat in Vietnam. Thus, it corroborated the insanity defense, showed that Felde's mental condition was not a recent concoction by the defense, and should have been admitted.

The letter states: "He served in combat over in Vietnam. Upon his return from Vietnam, he was stationed nearby and resided with us. He was a changed person upon returning from Vietnam. He was very quiet and not as fun loving. Had nightmares, talking in his sleep, was nervous and twitchy, and started drinking. He was discharged honorably from the army."

The letter was properly excluded as hearsay offered to show the truth of its substance. LSA-R.S. 15:434. The information in the letter was brought out during Krebsbach's testimony. This was the better evidence. Since Krebsbach testified about the letter, his 1975 opinion was given to the jury. There was no error.

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER THIRTEEN

"The improper exclusion from evidence by the trial court of Defense Exhibit 173."

[21] The trial court refused to admit in evidence a questionaire distributed by a group called "Citizen Soldier", which was intended to identify Vietnam veterans who had suffered from exposure to "Agent Orange" (Dioxin). It is argued that inability to question Michael Uhl, the founder of Citizen Soldier, about results of the questionaire prejudiced the defense.

The questionaire revealed unauthenticated complaints by other veterans. There was ample testimony that defendant's combat experience and exposure to Agent Orange could have created a post-traumatic stress syndrome. The questionaire results were hearsay and essentially irrelevant to the question of whether defendant was insane at the time of the crime. The exhibit was properly excluded.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER FOURTEEN

"The trial court improperly restricted the scope of defense inquiry into the issue of insanity and improperly limited the evidence to be utilized by the defense in establishing the insanity of the accused at the time of the offense by the required preponderance of evidence."

[22] Defendant contends that the trial court improperly prevented him from questioning Maria Krebsbach about the effects of World War II on her father. The desired testimony was irrelevant. LSA-R.S. 15:275.[17]

[23, 24] Defendant also alleges that defense witness Michael Uhl should have been qualified as an expert concerning the effect of Agent Orange on Vietnam veterans. Mr. Uhl had researched complaints from Vietnam veterans, but this did not qualify him as an expert on the effect of Agent Orange. Uhl was not allowed to testify about his own ability to cope with Vietnam combat because the subject was irrelevant.

[25] Defense counsel argues that the trial court erred in sustaining an objection to testimony of Linda Vandevanter, an operating room nurse in Vietnam, regarding the type of combat wounds received by Vietnam veterans and her personal feelings about the war. Both were irrelevant. There was extensive expert testimony by

17. LSA-R.S. 15:275 provides:
"In the discipline of his court, the trial judge is vested with a sound discretion to stop the prolonged, unnecessary and irrelevant examination of a witness, whether such examination be direct or cross, and even though no objection be urged by counsel."

Dr. Wilson and Dr. Figley about the effects of the Vietnam war on many of its veterans.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER FIFTEEN

"The granting by the trial court of the Motion by State for Independent Mental Examination of Defendant."

[26] The trial court ordered a mental examination of defendant by state experts in the middle of trial, but that order was vacated. It is argued that the prospect of the examination adversely affected defense counsel, his client, and the jury.

Since the examination never took place, the trial court's error in ordering it is moot. There is no evidence that the threat of the examination affected defense counsel or his client. There is no indication that the jury had knowledge of the proposed examination.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWENTY-EIGHT

"The repeated *sua sponte* interruptions, objections, remarks and comments, both express and implied, made by the trial court, in the presence of the jury, during the direct examination of defense witnesses, and the cross-examination of prosecution witnesses, by defense counsel, which were, no doubt, inferred by the trial jurors to be expressions of judicial opinion concerning relevant issues of facts, law and credibility bearing on the question of guilt, thereby affecting the jury in its role as ultimate trier of fact, and causing unfair prejudice to the accused."

[27] This assignment contends that the trial court made prejudicial comments on the evidence.

Once the trial court ordered counsel to "... please, let's get back to the subject matter of this case", (Tr. 1079) a proper admonition.

Maria Krebsbach said "I guess I'm lost" during the course of her testimony: the trial court commented "[t]he observation is correct" (Tr. 1553). There was no objection to the remark, which did not prejudice the defense.

When the court recessed for lunch, Ms. Krebsbach was on the stand and asked if she could leave. The reply was: "[Y]es ma'm". She said "Oh well, I ..." and was told: "[D]on't sit there for an hour and a half." (Tr. 1564) There was no objection to this comment. It was impatient but harmless.

When the prosecutor attempted to question Ms. Krebsbach about the effect of World War II on her father, the trial court, after a long dialogue, commented "You know we could get to calling everybody in World War II, maybe we should ..." (Tr. 1571). The trial court was indicating that the line of questioning was irrelevant.

During the examination of Dr. John Wilson, the trial court commented that the witness was creating a problem with his commentary and editorializing on every question. On occasion the trial court also attempted to limit irrelevant and unnecessary examination of various witnesses. LSA-R.S. 15:275. However, the trial court's few remarks do not establish that any impression of the accused's guilt or innocence was conveyed to the jury. LSA-C.Cr.P. art. 772; *State v. Williams*, 375 So.2d 1379 (La., 1979).

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER TWENTY-NINE

"The highly improper and inflammatory manner in which the prosecutor utilized and displayed photographic evidence during his impassioned argument to the jury, for the purpose of prejudicing the minds of the jurors against the defendant, deprived the defendant of a fair and impartial trial in that it caused the jury to return a verdict which was based on prosecutorial passion and prejudice rather than on the actual evidence properly introduced at trial."

[28] Defendant contends that the state deprived defendant of a fair trial by the manner in which certain photographic evidence was used in the prosecutor's closing argument. Displaying photographs, the state argued:

"Does this look like a foxhole or a cave, or does that look like the ride back at the penitentiary?

"Does this look like a war scene at night or does that look like a police car with sirens on top on a four lane highway in Shreveport, Louisiana? That's a ride back to the penitentiary.

"Does this look like anything you see in Vietnam. Or does that look like a ride back to the penitentiary.

* * * * * *

"You show me something that looks like Vietnam in this picture. You decide whether this looks like Vietnam or this looks like a ride back to the penitentiary and you decide if that man did not intend to kill." (Tr. pp. 2344–2346)

The use of the evidence and the prosecutor's remarks were within the scope of proper closing argument. Moreover, there was no objection and defense counsel did not ask for an admonition or mistrial. LSA–C.Cr.P. arts. 770, 775.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER THIRTY

"The prosecutor improperly influenced the jury to unreasonably reject the insanity defense by overemphasizing, and making repeated prejudicial prosecutorial references to, the consequences of the return by the jury of a verdict of 'Not Guilty by Reason of Insanity'."

It is contended that the prosecutor's argument aroused the passions, prejudice and fears of the jurors and convinced them that an insanity verdict would result in Felde escaping or being released to the detriment of the general public. The following argument was made:

"If you find him not guilty by reason of insanity, he is not going up to Michigan, or wherever his experts came from, and sit around with a bunch of Viet Nam veterans and talk about things. The Judge will tell you, he is going to a State Hospital until the doctors recommend he be released, and then a judge will decide when that will be six months or a year, five years, whenever a judge decides in the future, upon recommendation of doctors at a State hospital, he must be released, and the judge's decision is reviewable by the Supreme Court as to the merits of that decision. And if he lines up two or three, I mean, goes around, patting them on the back, I'm doing fine, acts real nice, just like he did in the pen, do it two, three, four years, take his medication, act great, recommend his release. And, you know, you can't keep him in jail because he is not going to be in jail. He's going to be in a hospital. He's escaped from the penitentiary. He wants to go to a hospital. He doesn't want to go to the pen for life or possibly face the death sentence. He wants to go to the hospital where he can get out. And, just like he testified, when they didn't give him parole, he got out. And what will he do when they don't turn him loose the first time he wants out?" (Tr. 2271–2272)

The jury was charged:

"If a verdict of not guilty by reason of insanity is returned in a case of this nature, the Court must commit the Defendant to a proper State mental institution or to a private mental institution approved by the Court for custody, care and treatment.

"The defendant shall not be released until and unless the court determines that he can be released without danger to himself or to others". (Tr. 2366)

[29] The prosecutor told the jury that Felde, if found not guilty by reason of insanity, would easily escape. There was no objection. Compare *State v. Sharp*, 418 So.2d 1344 (La., 1982). Because of the evidence that defendant was an escapee and intended to avoid further jail time, there was a factual basis for the argument.

LSA-C.Cr.P. art. 774. Although such "'. . . predictions of the consequences of the jury's verdict'" are improper, it is unlikely, in the context of the entire argument and the court's instructions, that the error contributed to the verdict. *State v. Hayes*, supra, 364 So.2d at 926.

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER THIRTY-ONE

"The prosecution argument to the trial jury contained comments by the prosecutor to matters not in evidence, thereby adding to the actual evidence in the record through the influence of the prosecutor's official position and causing the jury to arrive at a determination of guilt by giving greater weight to the assertions of the prosecutor than to the actual legal evidence introduced at trial."

In rebuttal, the prosecutor referred to things not in evidence when he referred to the automobile seat with the bullet holes from the police car. He implied that the seat was available, but the defense did not want the jury to see it.

"The bullet holes in the seat, and I believe that we stated in the presence of the Jury the seat was present in the courthouse if anyone wanted it. . . ." (Tr. 2333)

[30] It is argued that there was no evidence the seat was available. However, Lieutenant J.O. Blankenship testified that the car seat was present in the courthouse and several photographs of it were admitted in evidence. The brief reference to the car seat was harmless.

In his closing argument the prosecutor referred to information in Dr. Marceau's report which was not in evidence. In rebuttal the prosecution referred to statements made by Felde to Dr. Marceau and said that what Felde had said at that time was the truth.

The closing references to Dr. Marceau's report were as follows:

"He examined the Defendant on January 31st, 1979, approximately four months after the incident, and we submit approximately four months after the incident, because it is before the Defendant learned of the possibility of asserting a delayed stress defense. Dr. Marceau examined the Defendant, discussed the fact that the Defendant had been in Viet Nam, discussed the Defendant's drinking problems, the Defendant indicated extreme intoxication, and, thus, under some circumstances, not responsible for his actions, gave certain details of the offense that are not consistent with an alcohol blackout or consistent with a psychotic break or a break from reality, claimed he did not know for sure what he remembered as opposed to what he was told; but told him some things that only the persons in that car would be aware of, like, 'Pull the car over, I have a gun.' . . ." (Tr. 2250)

In rebuttal, the prosecutor said:

"And either the doctor made it up or someone made it up and it does not fit in any way as an incriminating piece of evidence in this case that he pulled the gun and told the policeman to pull over, back in January of 1979, when Dr. Marceau spoke with the Defendant. It doesn't fit in any way at that time as incriminating evidence. In fact, it would have been more incriminating for somebody to tell him he pulled the gun and started executing the policeman. But, see, the truth is, obviously, the Defendant told Dr. Marceau what he recalled at the time, four months after the incident." (Tr. 2343-2344)

[31] The prosecution erred in quoting from Dr. Marceau's report in his final arguments to the jury. This report was not in evidence. Compare *McKenna v. State*, 639 P.2d 557 (Nev., 1982) where the conviction was reversed because a court appointed psychiatrist testified about admissions made by the defendant during his psychiatric examination. There was no contemporaneous objection to the comments here and defendant did not request an admonition or move for a mistrial. The argument violated LSA-C.Cr.P. art. 774:

"The argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case.

"The argument shall not appeal to prejudice.

"The state's rebuttal shall be confined to answering the argument of the defendant."

The prosecution emphasized the fact that Felde apparently told Marceau that he had pulled a gun and told Thompkins to move over, but this does not necessarily negate the defense of insanity at the time of the crime. Felde testified that it was only after the first accidental shot was fired that he did not know what he was doing.

[32] The error in quoting from Dr. Marceau's report was not so prejudicial that it requires a new trial. *State v. Sharp*, supra. The jury was charged that the prosecutor's arguments did not constitute evidence.

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER THIRTY-TWO

"The *sua sponte* judicial decision to declare a lengthy court recess following the defense closing argument and prior to the rebuttal by the prosecutor resulted in severe prejudice to the defendant, particularly in light of the failure of the trial court to declare such a recess following the closing argument of the prosecution and before the closing argument of the defense."

[33] The jury was offered a break at the conclusion of the state's closing argument, and defense counsel neither agreed nor objected. The court said: "I am talking to the jury. Are ready to go? No one needs a break, then? Okay." (Tr. 2279) Defense counsel also did not object at the time to the recess he now finds objectionable. Since there was no earlier recess, the twenty minute break for the jury after lengthy arguments was not an abuse of discretion. *State v. Gordy*, 380 So.2d 1347 (La., 1980); *State v. Telford*, 384 So.2d 347 (La., 1980); *State v. Jones*, 412 So.2d 1051 (La., 1982).

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER THIRTY-THREE

"The rebuttal argument of the prosecutor to the trial jurors exceeded the scope of the defense closing argument."

[34] Defendant complains again about the mention in rebuttal of information in Dr. Marceau's sanity commission report, cited as an example of calculated prosecutorial overreaching. Since defense counsel alluded to material in Dr. Marceau's report in closing argument, the rebuttal did not exceed the scope of the defense's closing argument. There was no contemporaneous objection, and it is unlikely that the argument had an undue influence on the jury.

[35] Defendant also objects to the overruling of his objection to the prosecution reviewing the law on manslaughter, contending this was not proper rebuttal. Defense counsel had referred to the manslaughter statute in his closing argument so the rebuttal argument was proper.

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER THIRTY-FOUR

"The judicial refusal to permit, and the unconstitutional failure of Louisiana codal provisions to provide for, defense rebuttal argument to the trial jury on the affirmative defense of insanity."

[36] The state has the right to make the last argument to the jury. LSA-C.Cr.P. art. 765; *State v. Wiggins*, 337 So.2d 1172 (La., 1976).

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER THIRTY-FIVE

"The Louisiana statutory presumption of sanity and the Louisiana codal provisions placing upon the defense the burden of establishing insanity at the time of the offense, are unconstitutional."

[37] Defendant's burden of proof on the affirmative defense of insanity is constitutional. *State v. Lee*, 395 So.2d 700 (La., 1981); *Leland v. Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952); *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977).

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER THIRTY-SIX

"The jury sequestration procedures employed by the trial court failed to properly insulate the jurors from extraneous influences, or the possibility thereof, and throughout the trial there occurred a continuing and substantial failure by the trial court to adhere to the sequestration mandated in a capital case, as repeated contacts, communications and conversations which took place between the jurors and non-juror third parties may well have resulted in the jury verdicts being based upon, and affected by, influences extraneous of the legal evidence introduced at trial."

[38] Defendant contends that the jury was not properly insulated from outside influences because the jury room was the most convenient and, at times, the only place where hot coffee could be found. These allegations are unfounded and there is no real basis for the argument.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER THIRTY-SEVEN

"The prejudicial professional relationship between a trial juror and a prosecution witness whose identity as a member of the sanity commission appointed by the court on motion of the prosecution did not become known by defense counsel until subsequent to the return of the jury verdict."

There was apparently a relationship between juror Martha Dominguez, a psychiatric social worker, and a state witness. The record does not reveal with which witness Martha Dominguez was acquainted. It is contended that defense counsel thought defense rebuttal witness, Dr. Joe Ben Hayes, was the witness whom Martha Dominguez knew because the matter was brought up immediately after Dr. Hayes' rebuttal evidence in the following manner:

"BY THE COURT: Okay. I had one question here by Mrs. Dominguez. She was inquiring about any relationship that a Juror may have to a witness; and I will explain to her and to the Jury on that, if that is agreeable with you. It is almost impossible to pick a Jury that one or the other of the twelve may not have some relationship with some person to appear as a witness. My only inquiry to you, Mrs. Dominguez, is would this relationship at all affect you in rendering a fair and impartial verdict in the case? That is, can you ....

"BY MRS. DOMINGUEZ:

(Juror) A. Not under the circumstances given....

"BY THE COURT: That is what I want to know....

"BY MRS. DOMINGUEZ:

(Juror) A. Not under the circumstances....

"BY THE COURT: Whatever relationship you may have to any of the witnesses, you must put it aside and disregard it and weigh the testimony of all witnesses alike, under all of the circumstances, and I will give you some brief explanation of how to evaluate testimony of witnesses, so you will not let that enter ....

"BY MRS. DOMINGUEZ:

A. Not under the circumstances.

"BY THE COURT: Into your deliberation any more so than the consideration given to other witnesses....

"BY MRS. DOMINGUEZ:

(Juror) A. No, sir.

"BY THE COURT: Would not influence you because of your, perhaps, professional or personal relationship with the witness in your deliberation and rendition of verdict?

"BY MRS. DOMINGUEZ:

A. Correct, sir.

"BY THE COURT: All right. Fine. That's, I didn't think it would but it had to be said. All right...." (Tr. 2241-2243)

Defendant alleges in brief that, after the jury commenced deliberations, the judge told him the acquaintance was with Dr. Mauroner, the state witness who testified in rebuttal as a member of the sanity commission and a specialist in psychiatry that Felde was able to distinguish right from wrong.

[39, 40] Disclosure during trial that a juror is acquainted with a witness does not necessarily prevent a fair trial. *State v. Langendorfer*, 389 So.2d 1271 (La., 1980); *State v. Daniel*, 378 So.2d 1361 (La., 1979). Defense counsel did not attempt at the time to determine the identity of the witness with whom the juror was acquainted and did not move for a mistrial or object in any manner. LSA-C.Cr.P. art. 841. The juror's responses indicate that her acquaintance did not affect her verdict.

This assignment lacks merit.

ASSIGNMENTS OF ERROR NUMBER THIRTY-EIGHT, THIRTY-NINE, FORTY, FORTY-ONE, FORTY-TWO, AND FORTY-THREE

"A preponderance of the evidence properly introduced at trial clearly established that the defendant was legally insane at the time of the offense charged." (No. 38)

"The trial jury unreasonably rejected the affirmative defense of insanity as the record of evidence did not reasonably support the finding by the jury that the defendant was both sane and guilty beyond a reasonable doubt." (No. 39)

"The circumstantial evidence relied upon in this case by the prosecution to prove the essential element of 'specific intent to kill or inflict great bodily harm' was not legally sufficient for any rational trier of fact to conclude tha the requisite specific intent had been proved beyond a reasonable doubt." (No. 40)

"The evidence properly introduced at trial was insufficient for any rational trial jury to reasonably conclude that the prosecution had proved beyond a reasonable doubt that the requisite presence of the essential element of specific criminal intent was not precluded by the intoxicated or mental condition of the defendant at the time of the offense charged." (No. 41)

"The legal and competent evidence adduced at trial was not sufficient for any rational trial jury to find that every essential element of the offense of First Degree Murder had been proven beyond all reasonable doubt." (No. 42)

"The conviction in this case constitutes a deprivation of life, liberty and property without due process of law as it is based upon alleged conduct of the defendant which is totally attributable to combat infantry training, actual wartime combat experiences, and prolonged dioxin exposure, to which the defendant was subjected—but for which he was not subsequently treated—by the United States Government." (No. 43)

It is contended that the jury erred in finding Felde guilty of first degree murder and rejecting his defense of insanity at the time of the crime on the basis of the evidence presented.

[41] Defendant is correct in his contention that the expert testimony about Felde's post-traumatic stress syndrome by Dr. Wilson, Dr. Figley and Dr. Hayes, as well as the lay testimony about the affect of the Vietnam combat on Felde, is very persuasive. However, Dr. Marceau, Dr. Braswell and Dr. Mauroner, the three members of the sanity commission, all testified that defendant was sane at the time of the offense. Both Dr. Marceau and Dr. Mauroner are psychiatrists and a rational jury could have adopted their testimony over that of the defense witnesses.

[42] It is also argued that there was no evidence of specific intent to kill or inflict great bodily harm and that, in his intoxicated state and mental condition, defendant was unable to have such an intent.

There was evidence that indicated Felde deliberately killed officer Thompkins in order to escape. Felde's intoxication was apparently not total because he was able to get out of the police car, cross the median, negotiate the automobile lot, travel some additional distance and reload his gun while handcuffed.

Viewing the evidence in the light most favorable to the prosecution, a rational juror could have found that defendant failed to prove insanity by a preponderance of the evidence and that he had the specific intent to inflict great bodily harm or kill officer Thompkins. *State v. Claiborn*, 395 So.2d 770 (La., 1981); *State v. Lee*, 395 So.2d 700 (La., 1981).

These assignments lack merit.

ASSIGNMENT OF ERROR NUMBER FORTY-FOUR

"The defendant was denied effective assistance of counsel at trial due to adherence by defense counsel to an employment condition set by the defendant that defense counsel not attempt to obtain any jury verdicts other than 'Not Guilty by Reason of Insanity' or 'Guilty of First Degree Murder' with Capital Punishment."

It is contended that defense counsel's agreement with Felde that he would not attempt to obtain any verdict other than not guilty by reason of insanity or guilty of first degree murder with capital punishment denied Felde his constitutional right to effective assistance of counsel. LSA-Const. Art. 1, § 13; U.S. Constitution, Amend. 5. Felde required this of his counsel as a condition of employment.

[43, 44] To establish ineffective representation, it must be shown that counsel did not meet the level of competency normally demanded in criminal cases. An adequate defense must be based on informed professional deliberation. *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Marzullo v. State of Maryland*, 561 F.2d 540 (4th Cir.1977), cert. denied 433 U.S. 1011 (1978); "Effective Assistance of Counsel in Criminal Cases", 4:2 George Mason University Law Review at 241. Here, counsel, by agreement with his client, made an informed and deliberate decision not to ask for life imprisonment.

[45] In his closing argument defense counsel said, "first degree murder, the best thing you can do for him, if you don't go with insanity, is first degree murder with the death penalty." (Tr. 2325) This could have been a calculated ploy, an all or nothing gamble. Compare *Wiley v. Sowders*, 647 F.2d 642 (6 Cir.1981). "Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. *Estelle v. Williams*, 425 U.S. 501 at 512, 96 S.Ct. 1691 at 1697, 48 L.Ed.2d 126 at 135 (1976). The fact that a particular strategy is unsuccessful does not establish ineffective assistance. *Gray v. Lucas*, 677 F.2d 1086 (5 Cir.1982).

After the jury determined that Felde was guilty of first degree murder, the sentencing hearing was held immediately by agreement of counsel without objection by any of the jurors. The state presented no further evidence. The jury, during the guilt phase of trial, had heard extensive evidence about mitigating circumstances and had been exposed to a tremendous amount of sympathetic testimony about Felde. Compare *Washington v. Strickland*, 673 F.2d 879 (5 Cir.1982). The factual synopsis does not fully reflect the defense effort. Defense counsel argued at the sentencing hearing as follows:

"I think we all.... No, I can't say that. I feel that he has gone through hell for a long time and I can't see him going down to Angola in his condition and being subjected to what he would be subjected to there. So I am not going to ask you to do what I think would probably be the merciful thing to do. I am not going to ask you to do that myself. He is going to have to do that because I don't think I can, but I believe when you all were elected as Jurors you'd said you could apply the death penalty and I think it

would be pretty.... I think if you return the verdict that was returned you probably have to impose the death penalty, I would think." (Tr. 2383)

Wayne Robert Felde testified and advised the jury to return the death penalty and stated in response to counsel's question that he would be unable to control his future actions if the death penalty was not returned:

"BY MR. FELDE:

A. All I can say to you all is .... I would advise you to return the death penalty in this case.... Keith Oliver, I know your cousin Joe Oliver. We were cell partners for about eight (8) months.... Mr. Coker, I know one of your good friends, too, Tommy Strange. We picked this Jury and we picked them on intelligence. I consider all of you people intelligent so I hope you will take my advice, return the death penalty. Thank you.

"BY MR. THOMAS:

Q. What if .... the death penalty is not returned, Wayne, do you think you will be able to control your actions in the future? Can you guarantee them that you could control your actions if you would—(Interrupted)

A. I think other deaths will result. Yes, Mr. Thomas, I do. And that's why I suggested it, to prevent it from happening. They would be on your conscience if you can't return it. Now, I'm not trying to put you all in a bad position but you all are taking other people's lives in your hands, along with mine, so I think you should return it. I don't think no more needs to be said, Mr. Thomas. They're upset. Thank you." (Tr. 2385–2386)

Defense counsel later made a closing argument in which he said in part:

"... And at this point, I believe there is only one kind of help you can give him because I am not going to stand up here and tell you that you are doing him a favor by giving him life, because Angola is hell and for a crippled man it's hell twice over, and I think that's where he is going to go, first degree murder of a Shreveport policeman. (Tr. 2390)

* * * * * *

"... I'm waiting for something to come in here and tell me, you know, there's some reason I should ask you to spare this man but there's not. There, honestly, is not. There's not one reason that I can think of for him to continue to experience what he has been experiencing. I cannot think of one reason..." (Tr. 2391–2392)

Felde then made a closing argument as co-counsel:

"I'm not coming out and threatening anybody because that's not what it is. A walking time bomb, that's what it is. Somebody else will die as a result of it if I'm not put to death, I am sure. It's happened twice in eight years. There's been ten years of proof shown to you. I don't known where it went so, please, return that. I think, as countrymen, you owe me that much. I did my part. Please do yours. Okay?" (Tr. 2393)

There was no evidence other than Felde's testimony at the sentencing hearing.

In *State v. Clark*, 387 So.2d 1124 (La., 1980) defendant Clark told the jury he wanted to be sentenced to death but his counsel argued mitigating circumstances to the jury. Here, even after the guilty verdict, both Felde and his counsel pressed for the death penalty at the penalty phase of trial. After the jury rejected the claim of not guilty by reason of insanity, there is a grave question whether counsel could honor the agreement with his client and maintain a plea for the death penalty.

In *Bishop v. State*, 95 Nev. 511, 597 P.2d 273 (1979) defendant was allowed to represent himself, but the court appointed standby counsel. At the sentencing hearing, the state presented evidence of five aggravating circumstances: defendant refused to present any evidence of mitigating circumstances. Standby counsel informed the court that there were mitigating circumstances Bishop refused to allow them to present. Subsequently, on appeal, it was claimed that the court panel erred in not

hearing evidence of mitigating circumstances. The court stated:

"In the case at hand, Bishop had ample opportunity to present evidence of mitigating circumstances; however, he made it clear that he did not want to present or have standby counsel present such evidence. He had a Sixth Amendment right not to have counsel forced upon him. *Faretta* [*v. California*], [422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562] supra. When a defendant knowingly and voluntarily waives his right to counsel, as here, his refusal to present a defense does not negate his *pro per* election. *People v. Teron*, supra [23 Cal.3d 131, 151 Cal.Rptr. 653, 588 P.2d 773 (Cal., 1979)]. 'Under *Faretta*, the state may not constitutionally prevent a defendant charged with a commission of a criminal offense from controlling his own fate by forcing on him counsel who may present a case which is not consistent with the actual wishes of the defendant.' *Curry v. Superior Court*, 75 Cal.App.3d 221, 141 Cal. Rptr. 884, 887 (1977). For this reason, the sentencing tribunal did not err when it did not delve into the mitigating evidence referred to by the standby counsels." 597 P.2d 276.

[46-50] In the *Bishop* case an application for stay of execution was denied by the United States Supreme Court. *Lenhard v. Wolff*, 444 U.S. 807, 100 S.Ct. 29, 62 L.Ed.2d 20 (1979). The dissent claimed that the death penalty was being triggered by the arbitrary factor of the defendant's decision to acquiesce in his own death. However, that was not the view of the majority of the court. See *Gilmore v. Utah*, 429 U.S. 1012, 97 S.Ct. 436, 50 L.Ed.2d 632 (1976).[18] *Bishop* controls this issue. Felde, mentally competent to stand trial and enrolled as co-counsel, had a constitutional right to impose a condition of employment on his counsel. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Thus, a defendant can limit his defense consistent with his wishes at the penalty phase of trial. *Bishop*, supra. A defendant can also waive post-conviction habeas corpus remedies. *Gilmore*, supra. A defendant cannot waive his right to appeal a death sentence. LSA–C.Cr.P. art. 905.9; *People v. Stanworth*, 71 Cal.2d 820, 80 Cal.Rptr. 49, 457 P.2d 889 (1969); *Goode v. State*, 365 So.2d 381 (Fla., 1978). Felde has had an excellent presentation of his appeal. Counsel's agreement not to ask the jury for life imprisonment does not invalidate his conviction or sentence.

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER FORTY–FIVE

"The defendant was denied his right to effective assistance of counsel by the failure of defense counsel to voice timely contemporaneous objections, to request appropriate jury admonitions, and to move for mistrials, in numerous trial situations where the circumstances presented clearly required that such action be undertaken in order to protect and preserve the rights of defendant."

[51] Defense counsel claims that he denied Wayne Felde effective assistance of counsel. On the contrary, the record reveals that he made an unusually vigorous and spirited defense. The representation here was within the upper range of competence.

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER FORTY–SIX

"Newly discovered evidence of Post-Traumatic Stress Disorder, which was not discoverable before or during the trial

18. "After carefully examining the materials submitted by the State of Utah, the Court is convinced that Gary Mark Gilmore made a knowing and intelligent waiver of any and all federal rights he might have asserted after the Utah trial court's sentence was imposed, and, specifically, that the State's determinations of his competence knowingly and intelligently to waive any and all such rights were firmly grounded.
"Accordingly, the stay of execution granted on December 3, 1976, is hereby terminated." *Gilmore*, supra, 429 U.S. at 1013, 97 S.Ct. at 437, 50 L.Ed.2d at 633.

despite the exercise of reasonable diligence, would probably have changed the jury verdict of 'guilty' to a verdict of 'not guilty by reason of insanity', had that evidence been available for introduction at trial."

Defendant contends that, after the verdicts were rendered, counsel first received addresses for three of the eight members of Wayne Felde's unit in Vietnam. It is argued that a new trial should have been granted, because this testimony, not previously available, would have substantiated the defense of post-traumatic stress disorder.

[52] The expert and lay testimony on this point was quite comprehensive and the desired testimony would merely have been cumulative. LSA-C.Cr.P. art. 854 [19] provides that the newly discovered whereabouts or residence of a witness does not constitute newly discovered evidence. Further there was no statement of the facts which would be established by this new evidence. The new trial was properly denied.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER FORTY-SEVEN

"The unreasonable and arbitrary *ex parte* action of the trial court in summarily quashing defense process which had properly issued for the hearing on the Defense Motion for New Trial."

Defense counsel subpoenaed the prosecutor for the hearing on the motion for new trial but the trial court excused the prosecutor from the subpoena.

[53] Since the subpoena was served late and the prosecutor was unable to appear, the trial court was within its discretion in quashing the subpoena on the ground that it was oppressive.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER FORTY-EIGHT

"The denial by the trial court of the Defense Motion for New Trial."

[54] Defendant contends that a new trial should have been granted because DSM-III, the Diagnostic and Statistic Manuel III of the American Psychiatric Association first recognized post-traumatic stress disorder in 1980, only months prior to trial. However, there was trial testimony that the American Psychiatric Association recognizes this disorder. Although the DSM-III has been adopted in Louisiana hospitals since the trial, this factor is not so material that it would be likely to produce a different result. *State v. Talbot*, 408 So.2d 861 (La., 1981).

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER FORTY-NINE

"The failure of the trial court to grant the Defense Motion for Payment of Trial Expenses."

[55] This assignment of error is irrelevant to defendant's appeal.

ASSIGNMENT OF ERROR NUMBER FIFTY

"The Uniform Capital Sentence Report of the trial judge."

19. LSA-C.Cr.P. art. 854 provides:

"A motion for new trial based on ground (3) of Article 851 shall contain allegations of fact, sworn to by the defendant or his counsel, showing:

"(1) That notwithstanding the exercise of reasonable diligence by the defendant, the new evidence was not discovered before or during the trial;

"(2) The names of the witnesses who will testify and a concise statement of the newly discovered evidence;

"(3) The facts which the witnesses or evidence will establish; and

"(4) That the witnesses or evidence are not beyond the process of the court, or are otherwise available.

"The newly discovered whereabouts or residence of a witness do not constitute newly discovered evidence."

[56] Defense counsel contends that the uniform capital sentencing report submitted by the trial judge reflects a negative attitude toward the defendant because it contains erroneous information and that this attitude toward the defendant was conveyed to the jury during trial.

The report is inaccurate in two particulars. It states that defendant completed the eleventh grade, whereas he graduated from high school. It states that Felde was sentenced to fifteen years for second degree murder and five years concurrently for four counts of assault, but the second degree murder conviction was reversed. Defendant received a total of twelve years when he pled guilty to manslaughter and four counts of assault. This erroneous information could not have had any bearing on the jury's decision because the correct information was introduced in testimony at trial. The trial transcript does not establish a negative attitude by the trial court; the errors in the sentencing report were apparently inadvertent.

[57] Defendant also contends that he did not receive a copy of the capital sentence report as required by LSA–C.Cr.P. art. 905.9.1, § 3.[20] However, this technical omission did not harm the defendant.

This assignment lacks merit.

DEATH SENTENCE REVIEW

Under LSA–C.Cr.P. art. 905.9.1, every sentence of death is reviewed for excessiveness on the basis of three factors:

(a) Whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factors;

(b) Whether the evidence supports the jury's finding of a statutory aggravating circumstance; and

(c) Whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

[58] A. There is no indication that the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors.

[59] B. The fact, as the jury found pursuant to LSA–C.Cr.P. art. 905.4(b), that the victim was a peace officer performing his regular duties is an adequate aggravating circumstance. "There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property." *Roberts v. Louisiana*, 431 U.S. 633 at 636, 97 S.Ct. 1993 at 1995, 52 L.Ed.2d 637 at 641 (1977).

The evidence supports the jury's finding of this statutory aggravating circumstance.

[60] C. The sentence review memorandum filed by the state reflects that no death penalty has been imposed in Rapides Parish since January 1, 1976, and there have been no verdicts of first degree murder. The homicides involving a charge of first degree murder have been plea bar-

20. LSA–C.Cr.P. art. 905.9.1, § 3 provides:
"(a) Whenever the death penalty is imposed, the trial judge shall expeditiously complete and file in the record a Uniform Capital Sentence Report (See Appendix 'B'). The trial court may call upon the district attorney, defense counsel and the department of probation and parole of the Department of Corrections to provide any information needed to complete the report.
"(b) The trial judge shall cause a sentence investigation to be conducted and the report to be attached to the uniform capital sentence report. The investigation shall inquire into the defendant's prior delinquent and criminal activity, family situation and background, education, economic and employment status, and any other relevant matters concerning the defendant. This report shall be sealed, except as provided below.
"(c) Defense counsel and the district attorney shall be furnished a copy of the completed Capital Sentence Report and of the sentence investigation report, and shall be afforded seven days to file a written opposition to their factual contents. If the opposition shows sufficient grounds, the court shall conduct a contradictory hearing to resolve any substantial factual issues raised by the reports. In all case, the opposition, if any, shall be attached to the reports.
"(d) The preparation and lodging of the record for appeal shall not be delayed pending completion of the Uniform Capital Sentence Report."

gained to a charge of second degree murder or a lesser offense. None of the other murder cases involve the situation where a police officer has been killed. Thus, there are no similar cases, and this sentence cannot be held disproportionate to sentences in other cases.

For the foregoing reasons, the conviction and sentence of defendant, Wayne Robert Felde, are affirmed.

AFFIRMED.

DENNIS, J., concurs with reasons.

DENNIS, Justice, concurring.

I respectfully concur.

Normally, a defendant in a capital sentence hearing is entitled to a reasonably effective defense counsel acting as a diligent, conscientious advocate for his life. *State v. Myles*, 389 So.2d 12 (La.1980). The constitutional right may be waived, however, and there is clear and convincing evidence in this record, as the majority opinion says, that the defendant knowingly and voluntarily waived the right to have his counsel plead for his life. Accordingly, I concur, being of the opinion that, except in the case of a valid proven waiver, as in the present case, the failure of a defense attorney to act as a conscientious advocate for his client's life in a capital case will constitute a denial of effective representation.

ON REHEARING

PER CURIAM.

The state submits that the sentence memorandum compiled in compliance with LSA-C.Cr.P. art. 905.9.1. omitted the death sentence imposed on Avery C. "Pete" Moore. Moore was convicted of first degree murder in Rapides Parish on March 11, 1982. The jury recommended that a death sentence be imposed and Moore was sentenced accordingly on May 5, 1982. His appeal is pending: *State v. Moore*, Docket No. 82-KA-1709.

Moore is a sixty-four year old white male with a low I.Q. who was convicted of joining with two other men in abducting, robbing, and killing a store clerk. The jury found that the aggravating circumstances were: aggravated kidnapping; armed robbery; and an especially cruel crime. Moore had a previous conviction for the manslaughter of his wife on October 6, 1967, and had been released from prison within two years of the present offense.

There is a significant similarity between Moore's record and Felde's: both had prior convictions for manslaughter. The sentence of Robert Wayne Felde is not disproportionate to that of Avery C. "Pete" Moore.

Rehearing denied.

Linda B. DODD

v.

NICOLON CORPORATION, et al.

No. 82-C-0790.

Supreme Court of Louisiana.

Oct. 29, 1982.

Rehearing Denied Dec. 17, 1982.

Employee brought suit against employer and its insurer for benefits for permanent total disability and for penalties and attorney fees. The 19th Judicial District Court, East Baton Rouge Parish, William H. Brown, J., dismissed the case, and employee appealed. The Court of Appeal affirmed in its original hearing and on rehearing, 409 So.2d 1236, the appellate court again refused to grant employee any disability benefits but awarded her penalties and attorney fees, and further review was sought. The Supreme Court, Blanche, J., held that preponderance of evidence established that employee, whose work-related injury to her knees prevented her from performing significant physical tasks which

Supreme Court of Louisiana

NEW ORLEANS, 70112

FOR IMMEDIATE NEWS RELEASE NEWS RELEASE # 142

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 17th day of December, 1982, the following action was taken by the Supreme Court of Louisiana, composed of Chief Justice John A. Dixon, Jr., and Associate Justices Pascal F. Calogero, Jr., Walter F. Marcus, Jr., James L. Dennis, Fred A. Blanche, Jr., Jack Crozier Watson, and Harry T. Lemmon, in the cases listed below:

REHEARINGS DENIED:

81-KA-0998 State v. Wayne Robert Felde
See Per Curiam

81-KA-2627 State v. Joe D. Carter

81-KA-2629 State ex rel Alex Elaire v. Blackburn, Warden
DIXON, C.J., CALOGERO & DENNIS, J.J., would grant a rehearing
LEMMON, J., concurs with reasons.

81-KA-2717 State v. Alex Robinson

81-KA-2990 State v. Sammy Bernard and Clarence Simmons

82-C-0025 New Orleans Firefighters Association, et al v. City Civil Service Commission of the City of New Orleans, et al
(3 applications)
DIXON, C.J., MARCUS & BLANCHE, J.J., would grant a rehearing.

82-KA-0219 State v. Willie J. Robinson, Jr.
CALOGERO & DENNIS, J.J., would grant a rehearing.

82-C-0594 Naomi Carter,et al v. City Parish Government of Baton Rouge, et al

82-C-0790 Linda B. Dodd v. Nicolon Corporation, et al

308.30 Post-traumatic Stress Disorder, Acute

309.81 Post-traumatic Stress Disorder, Chronic or Delayed

The essential feature is the development of characteristic symptoms following a psychologically traumatic event that is generally outside the range of usual human experience.

The characteristic symptoms involve reexperiencing the traumatic event; numbing of responsiveness to, or reduced involvement with, the external world; and a variety of autonomic, dysphoric, or cognitive symptoms.

The stressor producing this syndrome would evoke significant symptoms of distress in most people, and is generally outside the range of such common experiences as simple bereavement, chronic illness, business losses, or marital conflict. The trauma may be experienced alone (rape or assault) or in the company of groups of people (military combat). Stressors producing this disorder include natural disasters (floods, earthquakes), accidental man-made disasters (car accidents with serious physical injury, airplane crashes, large fires), or deliberate man-made disasters (bombing, torture, death camps). Some stressors frequently produce the disorder (e.g., torture) and others produce it only occasionally (e.g., car accidents). Frequently there is a concomitant physical component to the trauma which may even involve direct damage to the central nervous system (e.g., malnutrition, head trauma). The disorder is apparently more severe and longer lasting when the stressor is of human design. The severity of the stressor should be recorded and the specific stressor may be noted on Axis IV (p. 26).

The traumatic event can be reexperienced in a variety of ways. Commonly the individual has recurrent painful, intrusive recollections of the event or recurrent dreams or nightmares during which the event is reexperienced. In rare instances there are dissociativelike states, lasting from a few minutes to several hours or even days, during which components of the event are relived and the individual behaves as though experiencing the event at that moment. Such states have been reported in combat veterans. Diminished responsiveness to the external world, referred to as "psychic numbing" or "emotional anesthesia," usually begins soon after the traumatic event. A person may complain of feeling detached or estranged from other people, that he or she has lost the ability to become interested in previously enjoyed significant activities, or that the ability to feel emotions of any type, especially those associated with intimacy, tenderness, and sexuality, is markedly decreased.

After experiencing the stressor, many develop symptoms of excessive autonomic arousal, such as hyperalertness, exaggerated startle response, and difficulty falling asleep. Recurrent nightmares during which the traumatic event is relived and which are sometimes accompanied by middle or terminal sleep disturbance may be present. Some complain of impaired memory or difficulty in concentrating or completing tasks. In the case of a life-threatening trauma shared with others, survivors often describe painful guilt feelings about surviving when many did not, or about the things they had to do in order to survive. Activities or situations that may arouse recollections of the traumatic event are

often avoided. Symptoms characteristic of Post-traumatic Stress Disorder are often intensified when the individual is exposed to situations or activities that resemble or symbolize the original trauma (e.g., cold snowy weather or uniformed guards for death-camp survivors, hot, humid weather for veterans of the South Pacific).

Associated features. Symptoms of depression and anxiety are common, and in some instances may be sufficiently severe to be diagnosed as an Anxiety or Depressive Disorder. Increased irritability may be associated with sporadic and unpredictable explosions of aggressive behavior, upon even minimal or no provocation. The latter symptom has been reported to be particularly characteristic of war veterans with this disorder. Impulsive behavior can occur, such as sudden trips, unexplained absences, or changes in life-style or residence. Survivors of death camps sometimes have symptoms of an Organic Mental Disorder, such as failing memory, difficulty in concentrating, emotional lability, autonomic lability, headache, and vertigo.

Age at onset. The disorder can occur at any age, including during childhood.

Course and subtypes. Symptoms may begin immediately or soon after the trauma. It is not unusual, however, for the symptoms to emerge after a latency period of months or years following the trauma.

When the symptoms begin within six months of the trauma and have not lasted more than six months, the acute subtype is diagnosed, and the prognosis for remission is good. If the symptoms either develop more than six months after the trauma or last six months or more, the chronic or delayed subtype is diagnosed.

Impairment and complications. Impairment may either be mild or affect nearly every aspect of life. Phobic avoidance of situations or activities resembling or symbolizing the original trauma may result in occupational or recreational impairment. "Psychic numbing" may interfere with interpersonal relationships, such as marriage or family life. Emotional lability, depression, and guilt may result in self-defeating behavior or suicidal actions. Substance Use Disorders may develop.

Predisposing factors. Preexisting psychopathology apparently predisposes to the development of the disorder.

Prevalence. No information.

Sex ratio and familial pattern. No information.

Differential diagnosis. If an Anxiety, Depressive, or Organic Mental Disorder develops following the trauma, these diagnoses should also be made.

In Adjustment Disorder, the stressor is usually less severe and within the range of common experience; and the characteristic symptoms of Post-traumatic Stress Disorder, such as reexperiencing the trauma, are absent.

Diagnostic criteria for Post-traumatic Stress Disorder
A. Existence of a recognizable stressor that would evoke significant symptoms of distress in almost everyone.

B. Reexperiencing of the trauma as evidenced by at least one of the following:

(1) recurrent and intrusive recollections of the event
(2) recurrent dreams of the event
(3) sudden acting or feeling as if the traumatic event were reoccurring, because of an association with an environmental or ideational stimulus

C. Numbing of responsiveness to or reduced involvement with the external world, beginning some time after the trauma, as shown by at least one of the following:

(1) markedly diminished interest in one or more significant activities
(2) feeling of detachment or estrangement from others
(3) constricted affect

D. At least two of the following symptoms that were not present before the trauma:

(1) hyperalertness or exaggerated startle response
(2) sleep disturbance
(3) guilt about surviving when others have not, or about behavior required for survival
(4) memory impairment or trouble concentrating
(5) avoidance of activities that arouse recollection of the traumatic event
(6) intensification of symptoms by exposure to events that symbolize or resemble the traumatic event

SUBTYPES

Post-traumatic Stress Disorder, Acute

A. Onset of symptoms within six months of the trauma.

B. Duration of symptoms less than six months.

Post-traumatic Stress Disorder, Chronic or Delayed
Either of the following, or both:

(1) duration of symptoms six months or more (chronic)
(2) onset of symptoms at least six months after the trauma (delayed)

300.00 Atypical Anxiety Disorder
This category should be used when the individual appears to have an Anxiety Disorder that does not meet the criteria for any of the above specified conditions.

Q Okay....

A For about three (3) years.

Q All right. Any other connections besides mental health in the Mental Health Center in Shreveport and the....in connection with the coroner's office?

A No, sir. No other public service.

Q Other than your present job right now?

A That's right. I was....a member of the faculty at LSU Medical School.

Q All right. In Psychiatry?

A In Psychiatry.

Q All right, sir. In connection with your appointment to the Sanity Commission, did you have occasion to visit my client, Wayne Felde, in the Caddo Parish Jail?

A Yes, sir.

Q And what date did you go see him on, Dr. Marceau?

A I saw him on....January the 31st, 1979.

Q Do you know how long it was that he had been in jail as of that time?

A ....I don't....know except what he'd told me.

Q With regard to his condition at that time, what type of physical condition did you perceive him to be in?

A ....he had....apparently, somewhat of a deficiency in his walk. I don't remember exactly if he used.... any particular aids to walk with but he did have some problems with his legs from what I....I remember.

Q You don't remember anything else about his personal appearance or anything. Is that right?

A Well, he....he was fairly well-groomed for....a prison inmate and came into the....interview quite

readily, and....seemed to be in fairly good control of himself at that time.

Q Seemed to be in real good spirits?

A He seemed to....be in fairly good spirits during most of the interview anyway.

Q Uh-huh. Right. Did you....he didn't complain of ....make any complaints to you regarding his physical condition, did he?

A Well, he did say that he didn't feel too good yet and he was....he had been wounded and....had.... recently got out....gotten out of the hospital. I understand that he was in....what was Confederate Memorial Hospital at that time, I believe. It is now LSU Medical School Hospital.

Q He didn't mention anything to you about any problems he was having with any of the jailers or any problems he was having with his medication or anything?

A No, he didn't....really complain about that.... situation.

Q Okay. How many times....how many more times did you see him?

A I just saw him that one time.

Q Oh, on that one (1) occasion?

A Right.

Q How long did you stay up there?

A Oh, about an hour, an hour and fifteen minutes, I imagine.

Q Okay. Did he appear to be.... You said he appeared to be....to want to be cooperative with you?

A Yes, he was cooperative.

CROSS EXAMINATION

BY MR. NESBITT:

Q Dr. Marceau, would you tell us what you recall the Defendant said happened that evening?

BY MR. THOMAS: Your Honor, I strenuously object and if....this isn't the time. If Mr. Nesbitt wants to bring that out, this isn't the time to do it, and if he wants to have any *rebuttal*, that's fine with me, but at this time, the State moved for the Sanity Commission and they appointed the coroner, a man here, who has had numerous contacts with the State, and another deputy coroner to examine this man. And with regard to any statements, there is a privilege, when the State moves for a Sanity Commission, there is a patient-psychiatrist privilege and that can't come out until such time as they might want to impeach Mr. Felde's testimony. At this time, there is a definite privilege there and we can find the cases, Your Honor. And Mr. Nesbitt, I submit is aware of that.

BY THE COURT: It is my understanding of the law, and I will let you look up some more, if you want, in a short period of time, but when you put him on the stand any privilege you had was waived, and he was called, this witness....

BY MR. THOMAS: That's not correct, Your Honor....

BY THE COURT: Was called by you. Well, I think that is the law.

BY MR. THOMAS: Well, we'll.... I mean....

BY THE COURT: If you have....

BY MR. THOMAS: Let me put it, that's not my, I might be wrong....

BY THE COURT: A case you want to show me to the contrary, I will be happy to look at it, but I haven't seen one. Get the slip from this lady here and let me look at this slip and we will take a recess. Certainly, we will do that when we come back. We will take a recess at this time. The question from Mrs. Dominguez was that she wanted to know a little more background on the Doctor's qualifications. So when we come back, Doctor, if you don't have a resume with you, maybe you can jot down something to give us a little more background on your education, training, and experience as we, in the legal profession, spout out....

A All right, I will be glad to do so.

BY THE COURT: Do you need a pad or something? Do you want to....

A Yes, I need a blank sheet.

BY THE COURT: I have got something here for him. Here you are, sir.

A Thank you.

BY THE COURT: Okay. Take the Jury out, please.

JURY REMOVED FROM COURTROOM

ARGUMENT ON BEHALF OF DEFENDANT

BY MR. THOMAS: Your Honor, number one, I would like to expand my objection from merely the physician-patient privilege, statutory privilege, to also include the Constitutional privilege against the right, where a defendant has the right not to incriminate himself in a criminal proceeding.

And the basis of my objection for the Constitutional privilege which we assert in support of our objection is the fact that the Minutes will reflect the State moved for the Sanity Commission in this case, Mr. Felde was compelled to meet with the psychiatrists, at which time, information was taken from him regarding this case.

We would submit that the holdings of the Louisiana Supreme Court, initially, in *State vs.*

which may or may not be integral part of the decision but we submit it is the law as reiterated in *State vs. Jones*, which is a 1978 case, 359 So. 2d 95, in which the Louisiana Supreme Court stated that no inculpatory statements made to the examiner are admissible in evidence at the merit trial of the defendant's guilt or innocence due to the fact that a sanity commission is not a critical stage of the proceeding in which the presence of counsel is required. That is the basis for

our Fifth Amendment privilege and we submit there was no waiver of the privilege as we did not ask any specific questions regarding specific information which Mr. Felde had given to the psychiatrist. In fact, the broadest question asked was what Dr. Marceau's opinion was based on, what Mr. Felde told him, he remembered or what was told to him, and he stated both and that his recollection was very vague. The defense did not pursue that any further.

With regard to the physician-patient privilege, in *State v. O'Quinn*, we would submit that the Supreme Court in that case, located at 362 So. 2d 503, rendered in 1978, said that the limitation, the only limitation where a defendant waives that privilege by tendering his mental state as an issue in the trial, the Supreme Court said the only limitation there announced is that by tendering his mental health as an issue the defendant waives the privilege, saying of physician-patient privilege, only as to such information as is genuinely relevant to the narrow issue there tendered providing that its probative value outweighs its prejudicial effect. And we submit strenuously that any, the type of information that Mr. Nesbitt is trying to bring out at this stage of the proceeding would certainly, the prejudicial effect would far outweigh the probative value and, therefore, that is the basis of our objection on both of those particular grounds.

BY THE COURT: All right. Hear from the State.

ARGUMENT ON BEHALF OF STATE

BY MR. NESBITT: Your Honor, the defense has changed their objection to rely on the Fifth Amendment. We need to make clear, we are not offering anything Mr. Felde may have said for the truth of it. We are just offering it for the fact that he said it to the Doctor as the basis of the Doctor's opinion.

We would submit, first of all, the Defendant raised the issue of sanity by pleading not guilty by reason of insanity and the law requires the Court to appoint a Sanity Commission at that point. At that point, the privilege that may otherwise exist between the defendant and examining physicians protecting any information he provided those physicians is waived insofar as that information is contained in the reports and the knowledge of the physicians on which their opinion is based as to the defendant's sanity.

That privilege would remain intact at a trial on the issue of the merits of the defendant's guilt or innocence until and unless the defendant elected to present evidence addressing his insanity, at which time, we submit, that whatever Fifth Amendment privilege otherwise would have existed that, in effect, is waived along with the physician-patient privilege at that stage.

The Defendant has called the gentleman to the witness stand and asked him his opinion and the

basis of his opinion and specifically inquired whether Mr. Pelde told him about the incident, something to that general nature.

The Bacque case is easily distinguishable in that Bacque dealt with a defendant who did not raise the issue of insanity but only the defendant's capacity to proceed. The law, at that point, requires the court to appoint a commission solely for that purpose. A commission was appointed for that purpose. The report was rendered to the court as to the defendant's capacity to proceed. At trial, insanity was not an issue, the State tried to call the psychiatrists, who examined the defendant, on the issue of capacity to proceed and asked them about the defendant's statements to them which was privileged at that point, not waived by the defendant and not an issue at the trial.

The *Harris vs. New York* case would certainly answer any Constitutional Fifth Amendment questions in that if there is, in fact, a privilege that is in existence here, regarding the Fifth Amendment, we have a situation where the basis of the Doctor's opinion is the Defendant's statement, although, we are not offering the Defendant's statement for the truth of it, we would submit that the statement itself will be inconsistent with other statements made by the Defendant that have already been placed before the Jury in connection with his testimony at a previous trial.

BY THE COURT: Sir?

BY MR. NESBITT: The Fifth Amendment does not stand to allow....

BY THE COURT: Oh, what you mean, the statements....you are contending that the statements made to the doctor or inconsistent with the statements that he made at the *McDonald* trial?

BY MR. NESBITT: At the *McDonald* trial, they are inconsistent with the contention of Mr. Thomas in his opening statement as to the Defendant's version of the facts, his memory of the facts, his degree of intoxication, what does or does not recall. It is, as a whole, inconsistent with the position the Defendant is now taking, and it is also inconsistent with other matters that have been explained to the Jury in opening statement regarding the "Agent Orange" and all of the stress syndrome business.

So we would submit, first of all, any privileges waived when the Defendant specifically raised the issue....

BY MR. THOMAS: Your Honor....

BY MR. NESBITT: And that the Fifth Amendment should not stand to allow the Defendant to place on the stand a psychiatrist and then shield from the Jury the basis of that opinion which is solely the information the Defendant elected to give the psychiatrist whether it is true or not.

- - - - - - - - - - - - - - - -

BY MR. THOMAS: Just as to the new point that he raised there, Your Honor. We would

request that should the Court consider the fact that there might be any inconsistencies in opening statement and the *McDonald* testimony as opposed to what he told Dr. Marceau, that there be a judicial examination of that material because we don't know of any inconsistencies between what he told Dr. Marceau and that.

Secondly....

BY THE COURT: Well, at this point, I don't think that you can bring it up to show that what the witness told someone is inconsistent with what the attorney says at the opening statement. I don't know about that type of an impeachment. I don't know who you are impeaching. Are you impeaching the Defendant or the....

BY MR. THOMAS: Impeaching me.

BY THE COURT: Attorney.

BY MR. THOMAS: The only other two things I'd say is that he didn't....

BY THE COURT: Well....

BY MR. THOMAS: He did not elect to tell Dr. Marceau that, really. He was forced to. And the other thing, of course, being the fact that the State has rebuttal. They would certainly have an opportunity on rebuttal and I think if they....if he even attempted to present it here, we would have grounds for a mis-trial.

BY THE COURT: Well, that is going to give me some concern, I guess at one stage of the proceedings, as to what right they may have to come

in,in rebuttal, and show that he made prior inconsistent statement. But the Court is seriously concerned with the waiver. If I accept the State's proposition that there is a waiver, then it would seem to me that every time a defendant pleads not guilty by reason of insanity, he automatically waives his Fifth Amendment rights.

BY MR. NESBITT: Could I address that point?

BY THE COURT: That bothers me.

BY MR. NESBITT: Your Honor....

BY THE COURT: Because the only way he can....

BY MR. NESBITT: That is....

BY THE COURT: Can plead insanity is to have a mental examination and if, at that mental examination, he has to tell those physicians everything he knows in order for them to make a proper evaluation, then that can always be brought out, so wouldn't it be tantamount to, in every case, a waiver of the Fifth Amendment?

BY MR. NESBITT: No, sir, we don't submit that, on the defendant's plea, the Fifth Amendment is waived. The Fifth Amendment comes into play if the inculpatory evidence is either used....inculpatory statement, assuming it is true, may be a completely exculpatory. He may have told Dr. Marceau a completely exculpatory version.

BY THE COURT: Well, if it was exculpatory, I wouldn't be worried about it.

BY MR. NESBITT: Yes, sir. That is the whole point. We submit that the essence of what he told Dr. Marceau regarding intoxication as a defense is totally exculpatory, and that is in the Sanity Commission Report itself.

BY THE COURT: I don't know what you seek to get from the Doctor....

BY MR. NESBITT: All right, sir.

BY THE COURT: Does someone have a report that I may look at....

BY MR. NESBITT: It should be in the record....

BY THE COURT: It at noon?

BY MR. THOMAS: I have got it right here. And he....since he doesn't say that he was ....it is exculpatory with regard to intoxication, Your Honor, I think it might be, he might have mentioned that issue but....

BY MR. NESBITT: If we can clarify.

BY MR. THOMAS: Of course, we are....

BY MR. NESBITT: We do not contend..

BY THE COURT: I would like to have a copy of the report and the statements that were made so that I can look at them, and maybe we're....

BY MR. THOMAS: Your Honor....

BY MR. NESBITT: The statements....

BY THE COURT: In a moot matter....

BY MR. NESBITT: The statements....

BY MR. THOMAS: On their face, they would appear to the Jury to be very inculpatory at this point in the proceedings.

BY THE COURT: No....

BY MR. NESBITT: The statements....

BY THE COURT: I don't know whether they are or not.

BY MR. NESBITT: The statements concerning the Defendant's degree of intoxication could have been misrepresented by the Defendant intentionally to the Doctor relying on the defense of intoxication at that stage. Now....

BY THE COURT: All right....

BY MR. NESBITT: I want to make clear that we do not contend that when the Defendant raises the issue of sanity, any Fifth Amendment privilege is waived because the Fifth Amendment comes into play in protecting the Defendant from giving inculpatory information and if the Defendant were to give information to a psychiatrist and that information were to be used to discover additional evidence against the accused, I would submit the propriety of suppressing that evidence would be a very serious issue. If the Defendant's version of what happened or his statement in any regard were offered by the State, and we are not offering anything. We are cross examining the Defendant's witness....

BY THE COURT: I understand the state of the proceeding....

BY MR. NESBITT: Yes, sir. If that is offered by the State to a Jury or a trier of fact on the issue of guilt or innocence, the Fifth Amendment privilege would prevent that from being done. The waiver of that occurred when the Defendant pled guilty....not guilty by insanity....

BY THE COURT: Now, wait just a minute. The burden is upon a defendant to prove insanity at....

BY MR. NESBITT: Yes, sir.

BY THE COURT: The time of the commission of the crime.

BY MR. NESBITT: Yes, sir.

BY THE COURT: The State does not even go into it.

BY MR. NESBITT: That's correct.

BY THE COURT: As you didn't....

BY MR. NESBITT: Yes, sir.

BY THE COURT: The case is with the defense and they are seeking to show that the accused was insane at the time of the commission of the offense.

BY MR. NESBITT: Yes, sir. And what we are saying, the Fifth....

BY THE COURT: He puts on his expert. Now are you entitled to question the expert as to what was told to the expert and elicit from the expert inculpatory statements?

BY MR. NESBITT: Well, sir, whether....

BY THE COURT: If you can in this case, then would it be true in every case.

BY MR. NESBITT: Well, no, sir. The point we are making is the Fifth Amendment remains intact until the defendant presents the expert witness at the trial....

BY THE COURT: Yes, sir, and that's where we are.

BY MR. NESBITT: In the defendant's behalf.

BY THE COURT: That's where we are.

BY MR. NESBITT: The Fifth Amendment is intact until that point and then it is waived when the defendant elects to make that presentation.

BY THE COURT: Well, if he doesn't elect to make that presentation, then he cannot....

BY MR. NESBITT: The State would be....

BY THE COURT: He cannot rely upon insanity as a defense.

BY MR. NESBITT: No, sir, the State would be prohibited from cross examining that witness or bringing that witness to testify to the Jury as to what the Defendant told him.

BY THE COURT: Well, that is what they are contending you shouldn't be permitted to do.

BY MR. NESBITT: Well, what we are contending is, that once they make that move, once they put that witness on the stand and asked him his opinion, we have the right to go into the basis of it, which happens to be, in part, what the Defendant related to the examining physician to determine....

BY THE COURT: Well, I cannot reason any other way but every time you plead not guilty by reason of insanity, you are subjecting yourself to a waiver of your Fifth whenever you put the witness on to show that you were insane, and the Defendant has that burden of proof.

BY MR. NESBITT: I would say that would be generally correct on the assumption that you are interpreting anything the defendant said as inculpatory. But if the defendant offers one exculpatory version to a doctor and later, at trial, offers a completely different or inconsistent version; we are not offering inculpatory statements as an admission to the crime or an admission to facts which would tend to prove guilt.

BY MR. THOMAS: Your Honor, if I can respond to that. If we do....

BY THE COURT: You don't think that this statement is not inculpatory? Would you....I haven't read it, but I just happened to pick out....

BY MR. NESBITT: We have....

BY THE COURT: One paragraph and read it without my glasses and I had to put them on to make sure that is there....

BY MR. THOMAS: I would say at this stage of the proceedings, Your Honor, it would be very inculpatory, and there has been no inconsistent version offered as of this time, either. Now, when we get to rebuttal of the State, I realize that we might be looking at an entirely....

BY THE COURT: We may....

BY MR. THOMAS: Horse of a different color. Maybe.

BY THE COURT: We may.

BY MR. NESBITT: In this statement, the Defendant....

BY MR. THOMAS: Your Honor, I don't want him to read the statement out loud, either, Your Honor, because there is too much danger of....we can talk about it in chambers or something. I don't want Mr. Nesbitt to read the statement out loud for any reason.

BY MR. NESBITT: It is in the record, Your Honor.

BY MR. THOMAS: And we can....

BY MR, NESBITT: Public....

BY MR. THOMAS: File it in the record or something.

BY THE COURT: What?

BY MR. NESBITT: It's a public record....

BY THE COURT: No, we don't have to read it. I can read it. Well....

BY MR. NESBITT: Our contention is....

BY THE COURT: That gives me some concern.

BY MR. NESBITT: All right, sir. Our contention is simply that the Fifth is intact until the defendant waives it at trial....

BY THE COURT: That's right.

BY MR. NESBITT: And it has been waived.

BY THE COURT: But wouldn't that be true in every case where a defendant pleads insanity?

BY MR. NESBITT: Not as to the....

BY THE COURT: In order to prove his insanity, at some state in that proceeding, he has got to waive his Fifth.

BY MR. NESBITT: Not as to the State calling the examining physician and asking that physician as to....

BY THE COURT: Now, wait, wait a minute. We are not calling about the State calling anybody....

BY MR. NESBITT: That's correct.

BY THE COURT: I am talking about....

BY MR. NESBITT: That is exactly right.

BY THE COURT: When the defendant seeks to put on the proof of his insanity at the time of the commission of the crime. In every case, when he does that, he waives his Fifth?

BY MR. NESBITT: No, sir. That is not our position. I think there are some subtle differences that exist between....

BY THE COURT: Tell me....

BY MR. NESBITT: Who is called by the....

BY THE COURT: What they are.

BY MR. NESBITT: For instance, if the defendant were to put on a series of civilian witnesses to testify he crawled around on the floor barking like a dog for the entire day before he committed some crime, I don't think the State would be allowed to call a physician that examined him and ask the physician what did the defendant tell you happened.

BY THE COURT: Well, I don't really....

BY MR. NESBITT: If the State.... if the defense calls that physician....

BY THE COURT: Now, now, Mr. Nesbitt, I really don't think you are being practical

because when they plead not guilty by reason of insanity, we always have some expert on the stand to testify about him.

BY MR. NESBITT: Well, not if all the doctors....

BY THE COURT: That has been my experience. And then, of course, they do put on laywitnesses to corroborate the testimony and the opinion of the expert. I think that is a little too subtle for me to buy.

BY MR. NESBITT: I don't know of any case law to support the Defendant's contention.

BY MR. THOMAS: I think that, Your Honor....a good point that was brought up just now, and the fact that the defendant does have the burden of proof on insanity, and even that is unlike a lot of jurisdictions and there has been a lot of controversy whether he should even have that burden....

BY THE COURT: I appreciate that....

BY MR. THOMAS: So it is sort of like....

BY THE COURT: But I don't think we need to get into that. This....

BY MR. THOMAS: Right. But I mean, it is sort of like, it adds a little more to the, to our argument, I think. I just wanted to mention that as a ground, also.

BY THE COURT: No, well, no, I have a fear of that, but not the same one you have and, that is, that one day we are going to get hit with a change of the law by the Louisiana Supreme Court, state that the, the burden of State to disprove the defendant's insanity at the time of the commission of the crime and we will get a bunch of cases reversed and retried, at least one. All right. I think I understand your positions. I will give you a ruling at 1:30. Court is at recess until 1:30.

ARGUMENT CONCLUDED

COURT RECESSED

- -

COURT RECONVENED AUGUST 15, 1980

JURY RETURNED TO COURTROOM

RULING OF THE COURT

BY THE COURT: The Court will now rule upon the subsequent objection made by defense counsel, and will sustain the same.

Ruling Concluded

"to these charges?" And you said, "No, sir."

Did the attorney whisper that in your ear, too?

A Yes. If it's on there, I, I assume he did, Mr. Nesbitt.

Q "Has anyone made any promises to you of a lesser sentence than what I told you the maximum penalties were, that is, fifteen years, of probation, immunity, or anything else in order to get you to plead guilty?" You said, "No, sir."

Did your attorney whisper that in your ear?

A I, I went on the advice of my attorneys, Mr. Nesbitt.

Q The Judge said:

"Are you in good health, mentally and physically?" You said, "Yes, sir."

"Have you been, or are you now, subjected to any way, to illness, accident, or nervous upset." Your answer was: "No."

A Mr. Nesbitt, I was eligible to go up for parole immediately upon that, and that was exactly what my feelings were that I was going to get. I went under the advice of my attorneys, feeling I would make parole.

Q Now, Mr. Felde, you don't recall telling Dr. Marceau on January 31st, 1979....

BY MR. THOMAS: Your Honor....

well, that's all right....

BY MR. NESBITT:

Q That you found out officers were looking for you because you were a fugitive and you had been serving a term for Manslaughter, that you left your job and went and bought a 357 magnum and some shells, that you were going to hitchhike out of town because you felt the police would be watching you on airplanes, buses, and trains, as well as your car....

BY MR. THOMAS: What we would request, Your Honor, is that he ask....instead of reading long paragraphs into the record, we would like him to separate the questions....

BY MR. NESBITT: Be glad to....

BY MR. THOMAS: And....

BY MR. NESBITT:

Q Do you recall....

BY MR. THOMAS: Instead of asking a long, narrative question....

BY MR. NESBITT:

Q Do you recall....

BY THE COURT: Well, I don't....

BY MR. NESBITT:

Q Telling Doctor....

BY THE COURT: Just, just a minute....

BY MR. THOMAS: That's my objection....

BY THE COURT: Let me rule on it....

BY MR. NESBITT: Excuse me.

BY THE COURT: I can't require the State to do that. I don't have the control over the way the State presents its case so the....

BY MR. THOMAS: Then, Your Honor, we would object....

BY THE COURT: Objection will be overruled.*

BY MR. THOMAS: To the questions asked for reasons previously discussed with the Court.

BY THE COURT: Well, that objection is overruled.*

BY MR. NESBITT:

Q Do you recall telling him that?

BY MR. THOMAS: Thank you, Your Honor. We would take an *assignment*.

BY MR. NESBITT:

Q Do you recall telling him that?

BY THE COURT: Well, you have it. It's written. It's a written motion.

BY MR. NESBITT: I'm sorry.

BY MR. NESBITT:

Q Do you recall telling him that?

A I recall telling them that I don't remember what I told them or if it's what I was told. I believe you'll find that in the report, too, if you'll read it down farther.

Q Well, it says that you....

A ....that's what I told them....

Q ....weren't sure exactly....

A ....that's what I told....

* *Assignment of Error*

Q ....how much you remembered....

A ....them, Mr. Nesbitt....

Q ....and how much you were told. That's....

A ....that's what....

Q ....do you recall telling....

A ....I told them....

Q ....him that? So if you, if he says you told him that, that's what you told him?

A I would assume it is, yes. I don't know. I don't remember it.

Q And did you see the photographs of your car that was obviously abandoned at the car wash?

A The photographs....

Q ....of your car....

A ....from who? The ones in this case?

Q Yes, sir.

A No, I don't believe I did.

Q Well, you did leave your car at the car wash?

A Yes, I did.

Q You didn't drive off in your car on the 20th. You'd left it?

A I left it there. Yes, I did.

Q Dr. Marceau recalls you telling him that you were afraid they'd be watching for you in your car. You told Dr. Marceau that you were going to get a backpack, which you were sending a friend for....

A Well, I had a backpack in my car, Mr. Nesbitt. If you'll go down to wherever you all have it stored, you'll find there is about a hundred-and-ten-dollar backpack in there I just bought.

Q Do you recall telling Dr. Marceau....did somebody

on motion of the State, which is permitted to examine him under the conditions under which he was....particularly, under the oppressive conditions he has been held in at the Caddo Parish Jail at that time, there's no doubt that statement was, it had a Fifth Amendment privilege attached when they took it from him; and the Fifth Amendment privilege being Constitutional, it's certainly a heck of a lot stronger than something like a physician-patient privilege which he does not waive by taking the stand; and, well, he may refuse....may waive his right to claim the Fifth Amendment privilege with regard to any questions Mr. Nesbitt asks him about the case, he certainly cannot waive a privilege which pertains to a statement taken in January of 1978; the privilege still attaches to a statement taken at that time; that would be our argument, Your Honor.

BY THE COURT: All right, sir.

Argument Concluded

BY THE COURT: Well, does the State wish to make a reply or not?

BY MR. NESBITT: They called Dr. Marceau to the stand as a defense witness and they asked him....

BY THE COURT: Well, he is arguing the Fifth Amendment....

BY MR. NESBITT: Yes, sir....

BY THE COURT: There is no physician-patient privilege on a Sanity Commission.

tell you that? That you had a backpack in your own car? Did anybody tell you that, Mr. Felde?

A I don't know. I don't understand what you're getting at.

Q Do you recall telling the Doctor that you had a backpack and you sent a friend for it, and you went into a bar and started drinking?

A I might've told the Doctor....

BY MR. THOMAS: Your Honor.... based on that question, I would object, Your Honor, and due to the line of questioning about, about what, on statements that he has already, that he told a psychiatrist that are clearly....told to that psychiatrist under the circumstances which they were told in the Caddo Parish Jail, which they, it is already in evidence, and I also ask that we would be able to argue it outside the presence of the Jury. I think that would be appropriate.

BY THE COURT: Take the Jury, please.

JURY REMOVED FROM COURTROOM

BY MR. NESBITT: Yes, sir.

BY THE COURT: That is a doctor that is appointed by the Court. Any physician appointed by the Court to examine a person does not create a physician-patient privilege.

BY MR. NESBITT: I would submit if he wanted to assert the Fifth, he shouldn't have gotten on the stand.

RULING OF THE COURT

BY THE COURT: It is the Court's opinion that he has waived the Fifth. The objection will be overruled.*

BY MR. THOMAS: Thank you, Your Honor, we would take an assignment with regard to that....

BY THE COURT: All right.

BY MR. THOMAS: On the grounds that, although, he has waived it today, he can't waive the privilege with regard to statements taken back in 1978, January. Thank you, sir.

BY THE COURT: Just to point out where we are now. The question asked was: Did he remember telling the Doctor such and such; as I recall the statement....

BY MR. THOMAS: The form....

BY THE COURT: I mean, the

* Assignment of Error

question of the State. Bring in the Jury....

BY MR. THOMAS: Your Honor, the form in which....I would have to incorporate in my argument the fact that, as I recall the question, it was asked in the manner, in effect, advising the Jury that he had told Dr. Marceau that on that date: Do you remember giving, do you remember his testimony? Do you remember....

BY THE COURT: I....

BY MR. THOMAS: When you talked to him on that date?

BY THE COURT: I fully appreciate the effect that it has on the Jury. It conveys that intelligence to the Jury; certainly.

BY MR. THOMAS: Well, I think - (Interrupted)

BY THE COURT: All right. All right, sir. Bring the Jury in....

BY MR. THOMAS: I would submit, Your Honor, that he can't use Dr. Marceau's name. I would like to say that....did he ever tell anybody that, but referring to that particular report, of course, is extremely prejudicial in the way he asked the question.

BY THE COURT: All right, sir. You've made your objection and you have it in the record.

JURY RETURNED TO COURTROOM

BY THE COURT: All right. Proceed, please, sir.

CROSS EXAMINATION OF WAYNE ROBERT FELDE
(Continued)

BY MR. NESBITT:

Q Mr. Felde, do you remember telling Dr. Marceau that you went to the bar and started drinking and got pretty inebriated?

A ....no, I don't....I repeat for you once more, Mr. Nesbitt. The Sanity Commission was composed of the coroner, the deputy coroner, and another State employee, and when they come up to see me, they had very little interest in what they really came up for and so I was subject to tell them anything.

Q Do you recall telling Dr. Marceau that you vaguely remembered pointing the gun at the police officer and telling him to stop and let you out, and when your instructions were not followed, the officer started wrestling with you for the gun, the car hit a guardrail and the gun went off?

A No, I don't.

Q And you don't recall telling Dr. Marceau that you were close to a garage or a small house and the police told you to drop the gun, when you didn't do that, they shot you because you weren't dropping the gun?

A No, I don't.

Q But you do recall telling him that your father was an alcoholic and committed suicide when you were thirteen?

A No.

Q You didn't....you don't recall?

A I don't recall talking to the man that much, Mr. Nesbitt. I honestly don't.

Q Do you think Dr. Marceau made that up?

A I'm not saying he made it up. I might've been listening in certain stages of his conversation when he brought up maybe my father. I don't know, Mr. Nesbitt....

Q ....do you recall....

A ....but I'm telling you, I had no faith in the man, no trust in the man, and I still don't. And what you got on that paper might be true and might not be true, I just have no knowledge of it. I don't remember telling him that.

Q Do you recall telling him that you started drinking heavily and your mother took you to a psychiatric facility but you did not cooperate and follow-through, and you joined the service when you were eighteen, stayed in for three years, you were in Viet Nam for a year and, although, you had quite a bit of problems in the service you got an honorable discharge in 1970?

A No, I don't. But I can see what you're getting at, what's your point, so you can go ahead and read the report, and then I'll just answer at the end of it.

BY MR. THOMAS: No objection if he wants to read it, Your Honor.

BY MR. NESBITT:

Q Do you recall telling Dr. Marceau that you were extremely intoxicated and you really didn't recall

what happened, couldn't control yourself, something like that?

A I recall talking to Dr. Marceau but I don't recall what I told him.

Q Well, you talked to him in January of '79, just four months after the incident.

A That is close to two years ago, too, isn't it?

Q You did talk to him just four months after the incident, though, didn't you?

A Yes, sir, I guess I did.

Q And wouldn't your memory of what you recall from that night be better then than now?

A If he was interested in hearing, yes.

Q And when you wrote the letter that has been filed in evidence to the attorney in Alexandria, you told that person that you were "extremely intoxicated at the time." Didn't you start off trying to convince everybody that you were so drunk you didn't know what you were doing and that it was an accidental shooting in the back of the car, there was no intent, therefore, you can't be guilty of murder?

A Well, no, I don't think so, Mr. Nesbitt.

Q You don't think that was it?

A No, I don't.

Q When did you first learn about your blood-alcohol content?

A When did I first learn?

Q Yes, sir.

A I still don't understand it.

Q You don't understand that?

system, we don't use it.

Q So, although, certain insurance companies and groups like that may be going on to it now or requiring people to use it and....

A ....I don't think they....

Q ....with regard....

A ....required it because I think there has been a delay in its official use.

Q Is it your testimony, then, at the time you examined Wayne Felde, you didn't know anything about that, this defect. Is that right?

A Well, no, sir, I wasn't aware of that term.

Q You stated to Mr. Nesbitt that you had gone into the details of the incident on October the 20th, 1978. Did you go into any, you didn't go into any details of what happened inside the police car, did you?

A Well, I didn't ask him specific questions as far as: 'Did he pull the trigger?' and such as that, but I did go into detail about what occurred at that particular time.

Q Do you have any sort of a recollection of whether or not he....was his memory, has a real good memory about what happened?

A There were things that he was vague about.

Q You haven't had any experience in working with Viet Nam veterans or anybody, really, who's....

A ....I'd have to differ with you on that; I have....

Q No, wait. Wait. I'm not, let me....

A ....oh....

Q ....let me....

A ....oh, okay.

A It would be better but I don't think the material would be that different because Mr. Felde was very cooperative and attentive and gave basically factual data that was validated at a later date.

Q That was validated?

A Well, in checking other, other material, yes, sir.

Q What other material?

A From....the past history.

Q What past history?

A ....the Pre-Sentence and Probation Investigation....

Q ....what....

A ....when he was in Maryland.

Q Oh, you mean....

A ....just....

Q ....oh, you mean further back?

A Yeah, just checking, yes, sir.

Q Where did you get that material to check it, to check....

A ....from the District Attorney's Office.

Q From who?

A District Attorney's Office.

Q Oh. Do you know if the other two psychiatrists in the case, I mean, do you know if Dr. Braswell and Dr. Marceau were furnished with those documents, too?

A I was not furnished. I went up to the office and reviewed them; and I don't know the actions of the other psychiatrists.

Q You went to the DA's office and reviewed them?

A Yes, sir.

Q Did you contact the District Attorney to get any

information from him?
A Yes, sir, if I'm going to give....
Q ....I mean, the defense attorney?
A The defense attorney?
Q Right.
A No, sir.
Q You didn't contact the defense attorney?
A No, sir.
Q Is there any way for you to determine whether or not a witness is reacting to you in an usual manner, in their normal usual manner?
A Now, when you say 'normal usual manner'....
Q Do you know if they are acting normally when you talk to them or not?
A No, every person has their own idiosyncrasies and their own mode of behavior so comparing his or her behavior at a particular moment, compared to the, at another time, I have no basis for it.
Q A person who has been incarcerated or in custody and undergoing treatment for severe wounds, undergoing perhaps mental and physical harassment, that would cause stress, wouldn't it?
A That is stress, yes, sir.
Q Those conditions would have created stresses that, of that nature, stresses of that nature which might ordinarily not have been present and could, in fact, have caused him to answer your questions in a manner in which he might not have answered them if he'd been in a less hostile environment in the Caddo Parish Jail, don't you think?
A That' possible, but then that would have more

validity if the interaction was negative rather than positive. He was very attentive and cooperative.

Q With regard to the interaction, what if, what if he had been held, his defense attorneys are not coming to see him, assume his defense attorneys do not come to see him, had very little time with them, he has been subjected or directed to this type of treatment and, all of a sudden, you come in there, I mean, don't you think he would be.... you are not a deputy, don't you think he'd be wanting to please or go out of his way to finally hope that he had somebody who's interested in his cause or his case?

A Possible.

Q I mean, you are an outsider, coming in, supposedly, unconnected with either side to examine him, isn't that right?

A Yes, sir, but also the degree of his cooperation.... was not in keeping with his feeling that his defense would be insanity. He was very cooperative. He did not try to present material in a biased way in his favor.

Q What about somebody who thought that something was seriously wrong with them or afraid of what might be wrong with them, and who find it impossible to discuss horrible experiences they might have had with the people closest to them much less a stranger, would that not be consistent with the way he acted towards you?

A I don't truly get the connection.

Q Well, how much did you, did you probe into his Viet

Nam experience?

A No, sir, I didn't go into his, into a specific.... because many people like to forget things, and I not only didn't do it with Mr. Felde but I don't do it with any individual whom I talk to. I give them an opportunity to tell me what they want to.

Q Have you experienced the phenomenon where people who suffer from a memory loss or selective recall, or whatever you want to call it, spotty memory, memory impairment, grope and try to remember, try to remember and want to remember what happened....

A ....well, quite....

Q ....in a period which is blank in their mind?

A Quite often.

Q And are they not more likely to be influenced by external stimuli, so to speak, as if, and those facts which might be suggested to them as to what might have happened, or facts that they might read in the newspaper as to what was supposed to have happened during that period, wouldn't that be extremely likely to have some affect upon what they think they might remember?

A Well, it would be difficult for him to separate what he read and what he was told and what he actually remembered.

Q And so a person, who has had that sort of an experience, may really not even know if what he is saying has any connection, whatsoever, with his independent recollection. Is that correct? It could be a scenario which is based purely on data which he, has been suggested to him, told to him

as you probably think that I did get from him.

Q Oh, I've got, I really have no idea.

A Well, it's just what he recalled and so, at that particular time, it was no attempt at fabrication in completing the story. In other words....

Q ....how....

A ....there was....

Q ....how can you say, can you say that, positively? I mean, when you say there's no fabrication or....

A ....well, in....

Q ....why do you say, why do you use the word 'fabrication'....

A ....well....

Q ....instead of, I mean, I'm trying to get exactly the way you were looking at him when you examined him. You said there was no fabrication. Now, if he related something to you that he might have read or been told and it had affected what he thought he remembered, why would you say he was fabricating it?

A Well, maybe this will help you to understand. What he related to me, there were gaps and he made no attempt, at the time he related these facts to me, to fill in the gaps.

Q But that would also be consistent with somebody who might have been hearing piecemeal accounts, either from people who were guarding him in the hospital or from accounts furnished to the newspaper by the police, isn't that correct?

A Well, I don't know whether it is correct or not, but I can't disagree with you.

Q The personal interaction between a person who was examining someone, psychologist or a psychiatrist, the personal interaction between his patient and himself, that will affect the results. Is that correct?

A Yeah, that is what we refer to as rapport....

Q ....uh-huh.

A ....R-A-P-P-O-R-T.

Q And with regard to rapport, at the time you examined him, how did you observe his physical condition to be and....he was in good shape?

A No, sir, he was in terrible shape.

Q What about pain? Did he mention pain to you?

A He was in pain. Yes, sir.

Q And what steps did you take with regard to him being in pain?

A In what regard?

Q What did you try to do for him?

A Well, I, I am not involved in the treating process....

Q ....I'm not that....

A ....I asked....

Q ....familiar with it, but I thought that all doctors, all medical doctors took some sort of an oath where they, you know, if people were hurting or something, they try to do something about it.

A Well, there're situations were....our hands are tied and we are not permitted to do this.

Q Did you go out and maybe even, you know, walk the....

A ....I asked him if he had been receiving his medicine for pain.

Q And he said, yes?

pushed down, it was discovered pushed down when the police were conducting their manhunt?

A No, sir.

Q With regard to the non-completion of the MMPI. MMPI's have a lie factor, do they not?

A Yes, sir.

Q So if....there were MMPI results....would a lie factor perhaps be affected by stress or anything like that?

A Well, the stressor....attempt to cover up but, in Mr. Felde's case, the lie scan was quite low, very low.

Q And with regard to the non-completion of the MMPI, what would that indicate to you? Would that mean that he is mistrustful or has no recollection or is confused or what?

A Some of that, and another factor is ambivalence.... the....

Q ....'ambivalence.' Now, before you go further. Now, that's a word that has been used with regard to some psychiatric testimony which was given in 1973, I believe, which is in evidence....

BY MR. THOMAS: Let me.... could I see Dr. Olivos' transcript?

BY MR. NESBITT: Could we ask the Doctor now to be able to complete the answer and then we came come back to the....

BY MR. THOMAS: I am going to ask the question....

BY THE COURT: Had you completed your answer?

A Well, no, sir....

BY MR. THOMAS:

Q Well, go ahead and complete it....

A Well....

BY THE COURT: Complete it, then, please.

A Okay, sir. Ambivalence....and the things that you mentioned, also the fact that it will, he didn't really....care to complete it because of the possible results of it might being used against him.

BY MR. THOMAS:

Q Well, you said he trusted you; didn't he?

A I said these are possibilities for an individual not completing.

BY THE COURT: Would you mind defining the term 'ambivalence'?

A Well, it's the....dual feeling of....the best way to explain it is love-hate....a need-fear. The young man who loves and respects his father but.... at the same time, would like to punch him in the face because his father said, no, he couldn't use the car to go out on a date.

BY MR. THOMAS:

Q Read you a sentence here, it says....from Dr. Olivos' transcript....excerpt of the testimony given on June 11th, 1973, in Maryland:

'During the interview that he had with me, he appears to be kind of stunned. He actually was in, sort of like....his memory was so spotty that he had this'

wrote a story about what he said.

The defense called Dr. Marceau. Stipulated he was an expert medical doctor, specializing in the field of psychiatry. A doctor, who, in fact, taught the Defendant's sole psychiatric expert and trained him in this field of specialty. A man who has taught at Baylor Medical School and lectured at many medical schools and psychiatric schools in the country, who has wartime experience to reflect on, director of mental health centers in Shreveport, in Lafayette, a practicing psychiatrist, a teacher in the LSU Medical School system.

He examined the Defendant on January 31st, 1979, approximately four months after the incident, and we submit approximately four months after the incident, because it is before the Defendant learned of the possibility of asserting a delayed stress defense. Dr. Marceau examined the Defendant, discussed the fact that the Defendant had been to Viet Nam, discussed the Defendant's drinking problems, the Defendant indicated extreme intoxication, and, thus, under some circumstances, not responsible for his actions, gave certain details of the offense that are not consistent with an alcohol blackout or consistent with a psychotic break or a break from reality, claimed he did not know for sure what he remembered as opposed to what he was told; but told him some things that only the persons in that car would be aware of, like, 'Pull the car over, I have a gun.' The

If he wanted to commit suicide, he had to have had the intent to do so. If he had the intent to do so, he had to inherently know right from wrong and know what he was doing when he tried to do it. That is inconsistent with having a break from reality, thinking he is in war in Viet Nam. Totally inconsistent.

And either the doctor made it up or someone made it up and it does not fit in any way as an incriminating piece of evidence in this case that he pulled the gun and told the policeman to pull over, back in January of 1979, when Dr. Marceau spoke with the Defendant. It doesn't fit in any way at that time as incriminating evidence. In fact, it would have been more incriminating for somebody to tell him he pulled the gun and started executing the policeman. But, see, the truth is, obviously, the Defendant told Dr. Marceau what he recalled at the time, four months after the incident.

Four hulls at the scene. Four reloads. One live in the chamber. Forty-one bullets in the box. They would have you believe that within minutes the police removed from the car, went to the scene where the Defendant was and figured out that, somehow, twenty-two months in advance, we can reload the gun and cock it and it is going to have some bearing on the case. I submit to you that is completely preposterous.

Does this look like a foxhole or a cave, or does that look like the ride back to the penitentiary?

82-6412

No. A-682

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WAYNE ROBERT FELDE, PETITIONER

V.

LOUISIANA, RESPONDENT.

ON WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FILED ON BEHALF OF THE STATE OF LOUISIANA, RESPONDENT

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STATEMENT OF THE CASE

In 1975, Wayne Robert Felde, plead guilty to manslaughter of a companion. He also plead guilty to four (4) counts of felonious assault against the police officers who participated in his arrest. While serving his sentence for these crimes Mr. Felde escaped from the penitentiary where he was incarcerated. He made his way back to Louisiana, the home of his mother. On October 20, 1978, he was working on a construction job in Shreveport, Louisiana when his sister advised him that law enforcement authorities were seeking his whereabouts. He immediately left the construction site leaving his automobile there. His sister drove him to Lorant's Sporting Goods store where he purchased a .357 magnum pistol and a box of shells. He loaded the pistol outside of the store. His sister left him at a Pizza Inn where he spent the balance of the afternoon drinking beer, eating pizza and drinking in a bar next door.

During the time he was at the bar someone saw the pistol which Felde had concealed on his person. Police were called and Officers Norwood and Tompkins responded. Felde had previously called a cab and Officer Tompkins tried to persuade the cab driver to take Felde from the scene. The cab driver refused. Officer Tompkins then offered to call another cab but Felde refused insisting that he be left alone. The police arrested Felde for simple drunk; they searched his person and found a box of shells. They did not find the pistol which was

concealed in his trousers. Felde told Officer Norwood that his gun was in his car in Mansfield, Louisiana. Officers cuffed Felde with his hands behind him and placed him in the rear of Officer Tompkins' car. There was no partition between the front and back seat of Officer Tompkins' car.

Shortly after Officer Tompkins drove off, William Sweet and John Colvin, who were in a car traveling the same direction as the patrol car heard several gunshots. They saw the brake lights of the patrol car come on and saw the patrol car swerve into the median which separated north and southbound traffic. Tompkins staggered out of the patrol car, crossed the northbound lane of traffic and collapsed. Felde got out of the police car, looked in Tompkins' direction, jumped the guard rail, and fled to a nearby car lot. From there he took refuge in a subdivision of homes hiding between two houses.

Mr. Sweet had seen the man in the back of the patrol car leaning up on the right side of the officer shortly before the first shot was fired. According to the testimony of Mr. Colvin and Mr. Sweet, either three or four shots were fired inside the patrol car.

Shreveport Police officers responded and conducted a house-to-house search for Felde. Officer McGraw found Felde in a crouched position armed with his pistol; Felde's hands were cuffed in front of his body and his pistol was cocked. After unsuccessfully ordering Felde to drop the pistol, McGraw shot him twice with his shotgun. Officers seized Felde's gun where it fell and determined that four live rounds were in the weapon. Another officer found

Officer Tompkins' pistol fully loaded near the median on Mansfield Road.

The coroner of Caddo Parish testified that Officer Tompkins sustained two gunshot wounds. The fatal wound struck him in the right rear flank, traversed a major artery and ultimately lodged in his abdomen. According to the coroner Tompkins died of this gunshot wound.

Identification officers noted two bullet holes in the rear of the front seat of Tompkins' car and three holes on the front of that same seat. Police recovered lead fragments from the car as well as from Tompkins' body. The bullet fragments recovered from Tompkins' body were determined to have been fired by the gun which belonged to Felde.

The Caddo Parish Grand Jury indicted Wayne Robert Felde for first degree murder.[1] Felde was represented by a Court appointed counsel and entered a plea of not guilty and not guilty by reason of insanity.[2] In accordance with State law the State asked the Court to appoint a Sanity Commission to determine Mr. Felde's sanity at the time of the crime.[3] The Court appointed Dr. Norman Mauroner, Dr. Robert Braswell and Dr. Fred Marceau to the Sanity Commission. Dr. Braswell was the coroner of Caddo Parish and a General Practitioner; Drs. Mauroner and Marceau were psychiatrists.

The Louisiana Supreme Court ordered the venue of the trial removed from Caddo Parish to Rapides Parish, Louisiana on motion of the defendant. [See their opinion at 382 So.2d 1384 (1980)] The case was tried August 11th through August 20, 1980 in Rapides Parish. During the trial Mr. Felde presented evidence to support an intoxication de-

fense[4] and an insanity defense. Regarding the latter the defendant called Dr. Marceau in his case in chief. Dr. Marceau described the psychiatric interview with Felde and commented on Felde's recollection of the crime. Dr. Marceau did not reveal the substance of what Mr. Felde had told him about the crime.[5] Thereafter Mr. Felde called three expert witnesses in his defense case to testify that he suffered from a mental illness, to-wit: Post-traumatic Stress Disorder and that because of this illness he was legally insane at the time of the crime. Dr. John Wilson, a psychologist with an expertise in the Post-traumatic Stress Disorder, testified that one of the many symptoms characteristic of this illness was an inability to recall details of a traumatic event. Wilson also testified on direct examination concerning the substance of Felde's statements to him during a private interview.

Finally Mr. Felde testified in his own behalf. He recounted the details of the crime insofar as he could recall them. On cross-examination the prosecutor asked Felde whether he had made a certain statement about the crime to Dr. Marceau during the psychiatric interview. Felde responded that he didn't recall making the statement; the prosecutor did not introduce the sanity report of Dr. Marceau nor did he ever recall Dr. Marceau in rebuttal to testify about the statement. Thereafter in the prosecutor's rebuttal closing argument he referred to this statement which Felde allegedly made to Dr. Marceau.

The jury convicted Wayne Robert Felde of first degree murder and thereafter recommended the death sentence following a bifurcated penalty hearing. The defendant appealed

his conviction and sentence to the Louisaina Supreme Court. The conviction and sentence were both affirmed and that Court denied petitioner's application for rehearing. Petitioner has now filed this application for Writ of Certiorari.

ISSUES PRESENTED

Petitioner has claimed that the prosecutor erred in cross-examining him about statements which he purportedly made to Dr. Fred Marceau during the psychiatric sanity commission interview. Petitioner further claims that the prosecutor erred in arguing to the jury that petitioner made certain statements to Dr. Marceau when in fact there was no evidence that these statements had ever been made. Petitioner basis these claims of error on the following grounds:

1. The defendant's Fifth Amendment privilege against compulsory self-incrimination was violated when Dr. Marceau did not advise him of his Miranda rights prior to conducting the psychiatric interview.

2. The defendant's Fifth and Fourteenth Amendment rights were violated because petitioner's statements to Dr. Marceau were not given freely and voluntarily but were the product of his own pain and suffering aggravated by the conduct of police and jailers who harassed him.

3. The petitioner's Sixth Amendment right to confrontation was violated because the prosecutor never introduced evidence that petitioner made the statements in question to Dr. Marceau and thus, petitioner was unable to confront the evidence against him.

4. Petitioner's Sixth Amendment right to counsel was violated because his appointed attorneys did not counsel with him prior to the psychiatric interview, nor were they present during the psychiatric interview with the sanity commission doctors.

5. Petitioner contends that none of these errors were harmless beyond a reasonable doubt.

ARGUMENT

Petitioner alleged insanity at the time of the crime

through his dual plea of not guilty and not guilty be reason of insanity. See La. R. S. 14:14 supra. He offered proof through lay and psychiatric testimony that he suffered from Post-traumatic Stress Disorder, an anxiety disorder which rendered him unable to distinguish right from wrong with reference to his conduct at the time of the crime. According to Dr. John Wilson, a defense expert, one of the symptoms of this illness was the petitioner's inability to recall facts of the traumatic event. [See transcript, pages 1787-1806] Furthermore, Dr. Wilson testified about things which Felde told him about the crime during their psychiatric interview. [Transcript, pages 1804-1805] As a result of Dr. Wilson's interview with Mr. Felde, he concluded that Felde suffered from Post-traumatic Stress Disorder and was legally insane at the time of the crime. [Transcript, page 1806]

Petitioner also called Dr. Charles Figley to testify that petitioner suffers from Post-traumatic Stress Disorder and Dr. Joe Ben Hayes, a psychiatrist, who testified that Felde was legally insane at the time of the crime because of his chronic Post-traumatic Stress Disorder. [Transcript, pages 1943-1945] Dr. Hayes also recounted for the jury a narrative of Felde's life as recounted by Felde during their interview. [1946 et seq]

Thereafter petitioner, Felde, testified in his own defense. He recounted his life before, during and after Vietnam and the events surrounding both homicides. Specifically he testified that at the time Officer Tompkins was shot Felde did not recall whether there was a struggle over the gun. [Transcript, page 2123] In Felde's version

he was attempting suicide when Officer Tompkins pulled him forward. [Transcript, page 2122]

Felde also testified that he would volunteer nothing to the doctors who were appointed to the Sanity Commission because he viewed them as police officers. He was polite but not cooperative. [Transcript, pages 2128-2129] On cross-examination the prosecutor asked Felde if he made certain statements to Dr. Marceau during the sanity interview. The most important statement about which Felde was asked is quoted from the transcript as follows:

> "Q. Do you recall telling Dr. Marceau that you vaguely remember pointing the gun at the police officer and telling him to stop and let you out, and when your instructions were not followed, the officer started wrestling with you for the gun, the car hit a guard rail and the gun went off?
>
> A. No I don't." [Transcript, page 2150]

Thereafter petitioner commented he had no objection to the prosecutor reading the statement from Dr. Marceau's report to the jury. [Transcript, page 2151] Later defense counsel and the prosecutor both made references to this statement during the closing arguments. [Transcript, pages 2295 and 2344] Dr. Marceau's report was not introduced into evidence; Dr. Marceau did not testify on rebuttal about the statement Felde made. The petitioner now alleges the prosecutor erred in asking the question about Felde's comments to Dr. Marceau and erred in arguing these comments to the jury.

I THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION/LEGALITY OF THE STATEMENT

Petitioner contends that Dr. Marceau should have

given him Miranda rights prior to the psychiatric interview because the psychiatric interview was the equivalent of custodial interrogation. The State submits that State and Federal jurisprudence holds that the Fifth Amendment privilege against compulsory self-incrimination does not apply at the sanity commission interview because the State cannot use the statements the defendant makes to the doctors as evidence of his guilt. See State vs Jones, 359 So.2d 95, (1978); State vs Breaux, 337 So.2d 182 (1976); U.S. vs Cohen, 530 F.2d 43 (1976).

Other cases have held that what an accused tells a doctor at a sanity commission interview may be admissible evidence against him when the accused has plead insanity and presented evidence of his insanity at trial. In such cases the statements can be used only to determine the issue of the accused's sanity at the time of the crime. U.S. vs Loe, 586 F.2d 1015 (1978) 4th Cir.; U.S. vs Madrid, 673 F.2d 1114 (1982) 10th Cir.; U.S. vs Reason, 549 F.2d 309 ('77) 4th Cir. The cases are clear that this evidence cannot be used by the State to prove guilt. See U.S. vs Leonard, 609 F.2d 1163 (1980) 5th Cir.; Gibson vs Zahradnick, 581 F.2d 75 (1978) 4th Cir.

The State agrees with the reasoning of these cases. The State should not be able to prove the crime by using the defendant's own statements about the crime when he speaks to a Court appointed doctor who seeks to determine his mental capacity to proceed to trial or his sanity at the time of trial. However, when the defendant chooses to place his sanity at issue and presents the trier of fact with lay and expert evidence to support this insanity the

State has a legitimate interest in addressing that issue. The State addresses that issue by testing the physician's basis for his opinion. This necessarily means that the physician may testify about the events of the crime as related by the accused because the physician must make that inquiry in order to give an opinion about the accused's sanity at the time of the crime. In this case the probative value of those recollections by the accused takes on greater significance because Felde's ability to recall facts was one of the symptoms of the mental illness upon which he based his defense. [Transcript, testimony John Wilson] The alleged statement to Marceau was probative on the issue whether Felde actually suffered that illness. Hence the prosecutor was correct in asking the question of Felde.

Petitioner relies upon Estelle vs Smith, 101 S.Ct. 1866 (1981) and New Jersey vs Portash, 440 U.S. 450, 99 S.Ct. 1292, 59 L.Ed.2d 501 (1979) to support his position. These cases are distinguishable from the issue now presented by Felde's case. In Smith the defendant did not put his sanity at issue, nor did he contest his competency to proceed to trial. He did not request the appointment of any physicians to examine him. Rather the Court appointed a physician on its own motion to examine the accused so that the Court would be sure that the accused was mentally competent to proceed to trial since it was a capital case. At the penalty phase of that case the State called the physician to testify regarding the defendant's propensity for violence. This Court properly equated that testimony with a physician's testimony about the defendant's guilt

and reversed the conviction.

Here the State did not seek to inquire about the information until Dr. Marceau had testified and until later when Mr. Felde had testified after presenting his lay and psychiatric evidence on the issue of his insanity. Estelle expressly distinguished this situation from the facts presented in that case. In Estelle the Court said:

> "Nor was the interview analogous to a sanity examination occasioned by a defendant's plea of not guilty by reason of insanity at the time of his offense. When a defendant asserts the insanity defense and introduces supporting psychiatric testimony his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case."

In Portash this Court held that the State could not use the compelled Grand Jury testimony of an accused to impeach the accused at his trial. In Portash the accused would never have testified before the Grand Jury except for a grant of immunity under compulsion by the State. Here the accused was not compelled to enter his dual plea and thereby interject into this proceeding the issue of his sanity, nor was he compelled to present lay and psychiatric evidence in support of that defense. Having done so the State was justified in inquiring into the basis and validity of that defense.

Under State law the petitioner also waived this objection by his contemporaneous failure to object during the questioning and at the argument stage.[6]

[6] La. C. Cr. P. Article 841 - "An irregularity or error cannot be availed of after the verdict unless it was objected to at the time of occurrence. A bill of exceptions to rulings or orders is unneccesary. It is sufficient that a party, at the time the ruling or order of the Court is made or sought, makes known to the Court the action which he desires the Court to take, or of his objections to the action of the Court, and the grounds therefore.
The requirement of an objection shall not apply to the Court's ruling on any written motion."

Petitioner's counsel specifically told the Court he had no objection to the prosecutor reading the contested statement to the jury. [Transcript, page 2151] Hence the error was not properly preserved and should not be reviewed by this Court.

The State submits that petitioner's Fifth Amendment privilege against compulsory self-incrimination was not violated by the prosecutor's questioning of Felde. The error, if any, occurred in the prosecutor's argument to the jury about a statement which was not in evidence. However, as stated above, petitioner did not contemporaneously object to the argument and hence waived this error. See La. C. Cr. P. Article 841. Moreover, any error in this regard was not of constitutional dimension nor did it effect the verdict in any significant way. [See Louisiana Supreme Court opinion 422 So.2d 370 (1982), at page 18] Thus, this issue is without merit and should be rejected by the Court.

[THE VOLUNTARINESS OF THE STATEMENT]

Petitioner also claims that his Fifth and Fourteenth Amendment rights were violated because any statements he made to Dr. Marceau were not freely and voluntarily made. They were, he contends, the product of his own pain and suffering aggravated by his harassment by police and jailers.

The record shows that Felde was seriously wounded when police arrested him. He was hospitalized and his life was saved through good medical care. [Transcript, pages 1712-1735] About three months after being wounded Felde saw the three members of the Sanity Commission in separate meetings. According to Dr. Marceau and Dr. Braswell, Felde never complained of harassment at the hands of the police or his jailers.

[Transcript, 936; 1148] All three physicians were able to communicate with him and he was able to communicate with them. It is highly unlikely that the elderly Dr. Marceau coerced Wayne Felde into saying anything. [See petitioner's description of Dr. Marceau at page 30 of his application.]

Furthermore Felde testified that he did not trust the doctors and viewed them as policemen. While he was polite to them he was not cooperative. This is the best evidence that what Felde said was not coerced but was exactly what he wanted them to hear. [Transcript, 2128; 2129; 2150]

From this factual background the State submits that the voluntary predicate required by State law[7] and the constitution was properly laid. Felde's statements were voluntary.

The State further submits that since these statements were voluntary the State could properly impeach the accused with these statements even if the Court should find that Miranda warnings were required by the Sanity Commission doctors. See Harris vs New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2nd 1 (1971); U.S. vs Castenada, 555 F.2d 605 (1977) 7th Cir. But also see U.S. vs Leonard, 609 F.2d 1163 (1980) 5th Cir. by comparison. The State submits that statements which Felde made to Dr. Marceau were freely and voluntarily made and that the State was justified in seeking to impeach him with them. This issue is without merit.

[7] La. R. S. 15:451 - "Before what purposes to be a confession can be introduced into evidence it must be affirmitavely shown that it was free and voluntary and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises."

SIXTH AMENDMENT RIGHT TO CONFRONTATION

Petitioner complains that his Sixth Amendment right to confrontation was violated because the prosecutor never introduced evidence that Felde made the statement in question to Dr. Marceau. Hence he was denied his right to confront the evidence on that issue. Petitioner's claim must fail for the following reasons:

1. Earlier in the trial petitioner prevented Dr. Marceau from testifying about the substance of these statements through his objections. [Transcript, pages 1152-1172]

2. Petitioner complains that the statements were inadmissible as evidence because his Fifth, Fourteenth and Sixth Amendment rights were violated. This position is inconsistent with the current allegation.

3. Petitioner did not object on this basis in argument and thereby waived his objection to the present question at trial. See La. C. Cr. P. Article 841 supra.

Moreover it can clearly be seen from petitioner's closing argument that he addressed this issue satisfactorily. [Transcript, page 2295] This issue is therefore without merit.

THE SIXTH AMENDMENT RIGHT TO COUNSEL

Petitioner claims that his Sixth Amendment right to counsel was violated because his lawyers did not consult with him prior to the psychiatric interview and because his lawyers were not present during the psychiatric interview. This claim is without merit because petitioner never raised this question at trial nor on appeal to the Louisiana Supreme Court. [See the opinion of the Louisiana Supreme Court at 422 So.2d 370 (1982) and La. C. Cr. P. Article 841.] Thus the Louisiana Supreme Court has not decided this issue. This Court should not grant a Writ of Certiorari on a question which the State court of last resort has not addressed.

This claim must fail on its merits as well. Petitioner relies on Estelle vs Smith supra for the proposition

that he was denied effective assistance of counsel by the State when the lawyers did not consult with him before the psychiatric interview. The distinction between this case and Estelle is significant. In Estelle the accused's lawyer was not notified of the purpose of the psychiatric examination. There the Court found that the State actively interferred with his right to counsel. In Felde the lawyers knew the purpose of the examination was to determine his sanity at the time of the crime. Indeed it may have been in Felde's best interest to be candid with the physicians at the psychiatric interview. At any rate, there is no showing in this record that the State in any way interferred with the petitioner's right to counsel. The remainder of the allegation about the lawyers is a reference to ineffective assistance of counsel. The State denies this claim on the merits and because this petition is not the proper procedural vehicle to raise this claim.

Petitioner's claim must also fail because his lawyers had no legal right to be present during the psychiatric interview. The jurisprudence is clear that a criminal accused who has plead insanity is not entitled to have the presence of his lawyer at this interview. See U.S. vs Cohen supra, State vs Breaux, 337 So.2d 182 and Estelle vs Smith, 101 S.Ct. 1866 (footnote fourteen) and the case cited therein. The lawyer's presence at the interview could interferewith the free flow of information which is critical to the doctor who must give the Court an opinion about the accused's sanity at the time of the crime. Since the accused's statements to that doctor cannot be used to prove his guilt or to punish him this psychiatric interview is not a critical stage at which the presence of counsel is required. Thus, Felde's Sixth Amendment right to counsel

claim must fall.

CONCLUSION

The State of Louisiana prays that this Honorable Court deny the petitioner's application for Writ of Certiorari in this case for the reasons which the State has set forth in its opposition.

Respectfully submitted,

STATE OF LOUISIANA

BY: Dale G. Cox

DALE G. COX
Assistant District Attorney
Caddo Parish, Louisiana

C E R T I F I C A T E

I certify that a copy of the foregoing Response has been served upon Nathaniel Graves Thomas, 1217 Oakland Street, Shreveport, Louisiana 71101, attorney for the petitioner, Wayne Robert Felde, by placing same in U. S. Mail this 4th day of April, 1983.

Dale G. Cox

DALE G. COX

FOOTNOTES

[1] R. S. 14:30 defined first degree murder at that time as: "First degree murder is the killing of a human being when the offender has specific intent to kill or to inflict great bodily harm.

Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation or supsension of sentence in accordance with a recommendation of the jury."

[2] R. S. 14:14 defined insanity as: "If the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility."

[3] La. C. Cr. P. Article 650 provides "when a defendant enters a combined plea of 'not guilty and not guilty by reason of insanity' the court may appoint a sanity commission as provided in Article 644 to make an examination as to the defendant's mental condition at the time of the offense. The court may also order the commission to make an examination as to the defendant's present mental capacity to proceed. Mental examinations and reports under this article shall be conducted and filed in conformity with Articles 644-646."

Article 644 - "(A) Within seven days after a mental examination is ordered, the court shall appoint a sanity commission to examine and report upon the mental condition of the defendant. The sanity commission shall consist of at least two and not more than three physicians who are licensed to practice medicine in Louisiana, and have been in the actual practice of medicine for not less than three consecutive years immediately preceding the appointment. No more than one member of the commission shall be the coroner or any one of his deputies.

(B) The physicians appointed to make the examination shall have free access to the defendant at all reasonable times. The court shall subpoena witnesses to attend the examination at the request of the defendant, the commission, or any member thereof.

(C) For the purpose of the mental examination, the court may order a defendant previously released on bail to appear for mental examinations and hearings in the same manner as other criminal proceedings."

Article 645 - "The report of the sanity commission shall be filed in triplicate with the presiding judge within thirty days after the date of the order of appointment. The time for filing may be extended by the court. The clerk shall make copies of the report available to the district attorney and to the defendant or his counsel without cost."

Article 646 - "The court order for a mental examination shall not deprive the defendant or the district attorney of the right to an independent mental examination by a physician of his choice, and such physician shall be permitted to have reasonable access to the defendant for the purposes of the examination."

[4]R. S. 14:15 - "The fact of an intoxicated or drugged condition of the offender at the time of the commission of the crime is immaterial, except as follows:

(1) Where the production of the intoxicated or drugged condition has been involuntary, and the circumstances indicate this condition is the direct cause of the commission of the crime the offender is exempt from criminal responsibility.

(2) Where the circumstances indicated that an intoxicated or drugged condition has precluded the presence of a specific criminal intent or of special knowledge required in a particular crime, this fact constitutes a defense to a prosecution for that crime."

[5]The trial judge sustained defense counsel's objection to the prosecutor's attempts to cross-examine Dr. Marceau about the substance of Mr. Felde's statements regarding the crime during the psychiatric interview. The trial judge ruled that these statements at this point in the trial were protected by Mr. Felde's Fifth Amendment privilege against compulsory self-incrimination. [See Felde's Petition for Certiorari Appendix Part D, pages 1147-1172]